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In The

Supreme Court of the United States

October Term, 1997

DONALD A. BARNETT, SHEILA GOLD, RONDA CHANEY, LON CHANEY, JR., WILLIAM MITCHELL and ROBERT Q. BUICKEROOD,

Petitioners,

vs.

GLENBOROUGH REALTY CORPORATION, GLENBOROUGH CORPORATION, ROBERT BATINOVICH and ANTHONY BLUMBERG,

Respondents.

On Petition For Writ Of Certiorari To The California Court Of Appeal For The First Appellate District

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the certification and settlement of a class action, without affording class members the right to opt out of the class or the settlement, violates the Due Process Clause of the Fourteenth Amendment, where the class members possess substantial claims for monetary relief which are foreclosed by the settlement.

LIST OF PARTIES

Petitioners are former limited partners of certain limited partnerships which were consolidated with other business entities in a "roll-up" transaction. Petitioners objected to the settlement of the class action lawsuit that arose from the transaction, but the trial court approved the settlement notwithstanding their objection. The California Court of Appeal for the First Appellate District affirmed the trial court's decision in *Donald Barnett, et al., v. Glenborough Realty Corporation, et al., and Anthony Blumberg*, slip op. A075278 (Feb.27, 1998). Petitioners' petition to the California Supreme Court for review of the decision of the Court of Appeal was denied on May 20, 1998. Petitioners are Donald A. Barnett, Sheila Gold, Ronda Chaney, Lon Chaney, Jr., William Mitchell and Robert Buickerood.

The respondents are Glenborough Realty Corporation (a California Corporation), Glenborough Corporation (a California Corporation) and Robert Batinovich, defendants below; and Anthony Blumberg, who was the plaintiff and class representative below.

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The opinion of the California Court of Appeal for the First Appellate District affirming the decision of the California Superior Court for the County of San Mateo to certify a mandatory class for the purpose of settlement of the class action lawsuit below and to approve the settlement is reprinted in the Appendix, beginning at page App. 1. The decision of the California Supreme Court denying Petitioners' petition for review of the decision of the California Court of Appeal for the First Appellate District is reprinted in the Appendix, at page App. 26. The opinion of the California Superior Court for the County of San Mateo granting preliminary approval to the settlement and certifying a mandatory class for the purpose of the settlement is reprinted in the Appendix, beginning at page App. 27. The opinion of the California Superior Court for the County of San Mateo giving final approval to the settlement of the class action lawsuit below is reprinted in the Appendix, beginning at page App. 49. All of these decisions are unreported.

JURISDICTION

The decision of the California Court of Appeal for the First Appellate District affirming the decision of the California Superior Court for the County of San Mateo to certify a mandatory class for the purpose of settlement of the class action lawsuit below and to approve the settlement was entered on February 17, 1998. Petitioner's timely petition for review of the Court of Appeal's decision to the California Supreme Court was denied on May

20, 1998. This Court's jurisdiction is invoked pursuant to 28 U.S.C. section 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part: " . . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . . "

I. STATEMENT OF THE CASE

A. Introduction

This Petition presents a fundamental issue of constitutional law: whether the Due Process Clause of the Fourteenth Amendment permits the certification of a mandatory, non-opt-out class in connection with a class action settlement which forecloses substantial damages claims. This Court has twice granted a writ of certiorari to resolve this precise issue – first, in *Ticor Title Ins. Co. v. Brown*, 510 U.S. 810, 114 S.Ct. 56, 126 L.Ed.2d 26 (1992), and again, in *Adams v. Robertson*, 518 U.S. 1056, 117 S.Ct. 37, 135 L.Ed.2d 1128 (1996). However, in both *Ticor* and *Adams*, the Court dismissed the writ as improvidently granted. In *Ticor*, prudential considerations dictated that the Court not decide whether a mandatory class offended the Due Process Clause in light of the unique posture in which the case arose. *Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 114 S.Ct. 1359, 128 L.Ed.2d 33 (1994). In *Adams*, it was determined that the petitioner had not properly presented the constitutional question to the lower courts.

Adams v. Robertson, 520 U.S. 83, 117 S.Ct. 1028, 137 L.Ed.2d 203 (1997). The Court noted its "continuing interest in this issue," 137 L.Ed.2d at 211 n.6, but held that its procedural rules required the dismissal of the writ.

This case presents the issue of the constitutional propriety of a mandatory class in a form in which this Court can decide it. The prudential considerations which caused the Court to decline to decide *Ticor* are not present here. Moreover, unlike in *Adams*, the constitutional question was expressly presented and decided below.

Indeed, this case presents the issue of the due process implications of a mandatory class settlement in its starkest form. Here, the class settlement released class members' damages claims with an estimated value of between $10 and $20 million. Yet, in exchange for the surrender of such valuable claims in the class action settlement, the members of the class received *no* monetary consideration: no cash, no credits, no coupons, no stock or other securities – indeed, no tangible consideration of any kind whatsoever.

As this Court recognized in granting certiorari in *Ticor* and *Adams*, the permissibility of a mandatory class in connection with a class action settlement which forecloses substantial damages claims is an important constitutional issue. Moreover, that issue is of considerable *practical* import to the administration of class actions in the lower courts. The question of whether or not an opt-out right must be extended to class members arises, actually or potentially, in virtually all class actions. The lower courts and class action practitioners require this Court's

guidance in determining what the constitution permits them to do in class action cases.

The need for this Court's guidance is particularly pronounced because those lower courts which have considered the constitutional issue have decided it in disparate and contradictory ways. Thus, the Ninth Circuit Court of Appeals, in *Brown v. Ticor Title Ins. Co.*, 982 F.2d 386 (9th Cir. 1992), *cert. dismissed*, 511 U.S. 117, 114 S.Ct. 1359, 128 L.Ed.2d 33 (1994), held unequivocally that a class action judgment which purports to release the substantial damages claims of class members without providing a right to opt out of the class violates the Due Process Clause and is therefore not binding on the members of the class. *Accord Clarke v. Advanced Private Networks, Inc.*, 173 F.R.D. 521 (D. Nev. 1997). The California Court of Appeal below, relying on the prior California case of *Bell v. American Title Ins. Co.*, 226 Cal.App.3d 1589, 277 Cal.Rptr. 583 (1991), has rejected the Ninth Circuit's holding in *Brown*, holding that a mandatory settlement class is constitutionally permissible even where it releases substantial damages claims.

A conflict exists on this issue not only between the federal and California courts but also between different federal circuits. Thus, the Third Circuit has held that substantial damages claims can be extinguished through a mandatory class settlement as long as the court has *in personam* jurisdiction over the class members. *Grimes v. Vitalink Communications Corp.*, 17 F.3d 1553, 1560 & 1560 n.8. (3d Cir.), *cert. denied*, 513 U.S. 986, 115 S.Ct. 480, 130 L.Ed.2d 393 (1994). The Ninth Circuit, in turn, has expressly *rejected* the Third Circuit's holding in *Grimes*, stating that the constitutional right to opt out *is not*

limited to those absent class members over whom the trial court lacks *in personam* jurisdiction. *Epstein v. MCA, Inc.*, 126 F.3d 1235, 1242 (9th Cir. 1997); *Brown*, 982 F.2d at 392. Petitioners submit that this Court should grant certiorari to resolve these conflicts.

B. Factual Background

The action below arose out of the consolidation of certain publicly traded limited partnerships[1] into Glenborough Realty Trust, Inc., a newly created real estate investment trust (the "REIT"). The consolidation was of a type known as a "roll-up," and it is referred to herein as "the Roll-Up." Under its terms, the Partnerships were combined not only with each other but also with various businesses and business interests owned or controlled by the Partnerships' General Partners, defendants Glenborough Realty Corporation ("GRC") and Robert Batinovich ("Batinovich") (collectively, "the General Partners") to form the REIT. Shares in the REIT were then allocated among the approximately 18,000 limited partners in the Partnerships ("the Limited Partners"), on the one hand, and the General Partners and persons and entities affiliated with them, on the other.

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[1] The limited partnerships in question were Equitec Income Real Estate Investors B, Equitec Income Real Estate Investors C, Equitec Income Real Estate Investors – Equity Fund IV, Equitec Mortgage Investors Fund IV, Equitec 79 Real Estate Investors Outlook Properties Fund IV, Glenborough All Suite Hotels, L.P., and Glenborough Pension Investors. They are collectively referred to hereinafter as the "Partnerships".

C. Procedural Background

1. The Complaint

The action below was commenced in the Superior Court of the State of California for the County of San Mateo on February 21, 1995, at a time when the Roll-Up had been formally proposed but had not yet occurred. The complaint filed by plaintiff Anthony Blumberg ("Blumberg") alleged that the Roll-Up was "unfair," "coercive" and "deceptive" to the Limited Partners in that (1) the amount of common stock of the REIT to be issued to the General Partners and their affiliates in the Roll-Up was excessive and disproportionate; (2) the Roll-Up would prevent previously scheduled liquidations of the Partnerships' properties, to the Limited Partners' detriment; and (3) the Roll-Up was designed to perpetuate the General Partners' ability to earn management fees and other consideration, to the disadvantage of the Limited Partners.[2]

The complaint alleged two causes of action, for breach of fiduciary duty and breach of the duty of good

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[2] "Rollups" have been extensively criticized on the ground that they almost always benefit and enrich the general partners at the expense of the Limited Partners. *See, e.g.*, John Geschke, *Regulating Rollups: General Partners' Fiduciary Obligations In Light of the Limited Partnership Rollup Reform Act of 1993*, 47 Stan.L.Rev. 85 (1994). Indeed, perceived abuses by general partners in effectuating such transactions have led to both federal and state legislation to prevent further abuse. *See* Limited Partnership Rollup Reform Act of 1993 (15 U.S.C. § 78n(h) *et seq.*; Killea-Thompson Act (Cal. Corp. Code § 25014.5 *et seq.*)

faith and fair dealing, and sought money damages and injunctive relief. Named as defendants were the General Partners and Glenborough Corporation ("GC"), an entity controlled by the General Partners which was to be one of the entities consolidated in the Roll-Up.

Blumberg did little to actively prosecute the action. Rather, almost immediately after filing the action, Blumberg's attorneys began discussing settlement with the defendants. Some three months after these talks began – and barely four months after the Complaint was filed – plaintiff Blumberg and the defendants reached "substantial agreement" on the substance of a settlement. At the time of the agreement, no formal discovery had been conducted, and the sum total of information obtained by plaintiff Blumberg from defendants consisted of one and one-half boxes of documents made available for purposes of the settlement discussions only.

2. The Settlement

A formal settlement agreement was executed on October 9, 1995. The parties agreed, first, to jointly propose to the court the creation of a mandatory "Settlement Class" consisting of all Limited Partners. The Settlement Agreement provided that no member of the class would have the right to opt out or otherwise exclude himself from the class, and that the settlement, if approved by the court, would bind all Limited Partners. App. 42.

On behalf of the "Settlement Class," Blumberg agreed to a broad release of all claims arising out of the Roll-Up which were or could have been asserted by any

Limited Partner against any person, whether named as a defendant in the action or not. App. 43. The claims released included claims for money damages estimated at between $10 million and $20 million. Nevertheless, the Settlement Agreement did not provide for the payment of any money or other tangible consideration by the defendants to the members of the class. App. 40-42.

Rather, the sum total of the consideration obtained for the class in the settlement consisted of (1) the addition of four "curative disclosures," consisting of eight sentences in all, to the over 400-page prospectus prepared and disseminated in connection with the Roll-Up;[3] and (2) a modification of certain conditions on the sale of REIT stock or the issuance of stock options in the REIT.[4] Neither the eight sentences added to the prospectus nor the provisions relating to stock or stock options even

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[3] By the time the Settlement Agreement was signed, the defendants had already added these eight sentences to a new version of the prospectus which they had issued to the Limited Partners.

[4] There were three such modifications: *First*, the defendants and their affiliates had already agreed not to sell their REIT stock for one year after the Roll-Up without the permission of the REIT's Board of Directors. This restriction was extended by an additional year, to two years. *Second*, the REIT was already forbidden to issue stock options to its employees for 60 days after the Roll-Up. This prohibition was extended by an additional 30 days, to 90 days after the Roll-Up. *Third*, defendants agreed that the REIT would not grant any stock options with an exercise price of less than $15.00 per share for one year after the Roll-Up. App. 41-42.

purported to remedy any of the respects in which the complaint had contended that the Roll-Up was unfair. They did not readjust the allocation of REIT stock between the Limited Partners, on the one hand, and the General Partners and their affiliates, on the other, which the complaint had alleged was unduly favorable to the General Partners. They did not alter in any way the reality that consolidation would prevent the Partnerships from liquidating their assets as previously planned and distributing the proceeds of such liquidation to the Limited Partners. Furthermore, they did nothing about the perpetuation of excessive management and other fees alleged in the complaint.

While the settlement did not afford the Limited Partners any monetary relief, it was more generous to the plaintiff class representative and his attorneys. Under the terms of the settlement, the plaintiff class representative, Mr. Blumberg, was authorized to seek an "incentive bonus" of $5,000, and the two law firms representing Mr. Blumberg were entitled to seek attorneys' fees and costs in the amount of $850,000.[5]

3. Class Certification and Objections To The Settlement

Immediately after executing the settlement agreement, the parties sought preliminary approval of the

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[5] App. 52. The attorneys' fees to be received by Mr. Blumberg's counsel amounted to approximately $1,000 for each hour worked on the case.

settlement. On or about October 11, 1995 – two days after the agreement was signed – the parties appeared *ex parte* before the trial court to seek an order certifying the settlement class and preliminarily approving the proposed settlement. It appears, however that no paper of any kind was presented to the court other than the settlement agreement and the proposed order itself. Moreover, there is no transcript of the proceedings before the court.

By Order dated October 11, 1995, the trial court certified a plaintiff class for purposes of the settlement and granted preliminary approval to the settlement. The trial court's class certification order stated that the class was certified pursuant to section 382 of the California Code of Civil Procedure,[6] and was conditioned on final approval of the settlement. The law firms representing the plaintiff, Mr. Blumberg, were appointed as Class Counsel. The portion of the Order certifying a mandatory class was extremely brief, and incorporated neither discussion nor analysis of the released claims. Rather, the Order simply provided that members of the class "are precluded from

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[6] The Order also referred to Federal Rules of Civil Procedure 23(b)(1) and (b)(2). Under California law, federal rules and precedents regarding class actions are not controlling but, rather, are merely of persuasive value, even with respect to issues on which the California courts have not spoken. *Vasquez v. Superior Court*, 4 Cal.3d 800, 821, 94 Cal.Rptr. 796 (1971).

excluding themselves from the Final Judgment . . . and may not opt out of the Settlement Class." App. 42.

Two groups of Limited Partners (of whom one comprised the Petitioners herein) and four individual Limited Partners filed objections to the proposed settlement. Among other things, it was argued that the trial court had violated the due process rights of the absent class members by certifying a mandatory non-opt out settlement class which would extinguish substantial claims for money damages. The trial court held a hearing on the application for final approval of the settlement on January 17, 1996. By that time, the Roll-Up had already occurred. Accordingly, any effort to enjoin the transaction was moot, and the only relief prayed for in the complaint which would have been available to the class members had the settlement not been approved was damages. By written order dated June 4, 1996, the trial court overruled the objections asserted by the objecting class members and granted final approval of the settlement. App. 49.

4. The Appeal

Petitioners appealed the decision of the trial court to the California Court of Appeal. Petitioners argued, *inter alia*, that the trial court had violated the due process rights of the absent class members by certifying a mandatory class for purposes of a settlement which released substantial damages claims.

The Court of Appeal affirmed the ruling of the trial court. In an opinion dated February 18, 1998, the Court of Appeal held, *inter alia*, that the constitutional opt-out

right recognized in this Court's decision in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985), did not apply to class actions in which both money damages and injunctive relief were sought, so long as the trial court concluded, either explicitly or implicitly, that the relief obtained in the settlement was primarily equitable.

The Court of Appeal first found that *Shutts* was limited "to those class actions which seek to bind known plaintiffs concerning claims wholly or predominantly for money judgments." App. 18. The Court of Appeal held that *Shutts* "did not compel a due process right to opt out of a class action" in actions such as the one below, where both equitable relief and money damages were sought. App. 19. Instead, the Court of Appeal found that it is in the trial court's discretion to determine whether an action seeks predominantly money damages or injunctive relief. App. 20-21. If the trial court found that the action seeks "predominantly" equitable relief, there is no constitutional right for absent class members to exclude themselves from the settlement. *Id.*

The Court of Appeal then found that certification of the settlement class in the action below was "appropriate" because (1) there was a likelihood of separate actions against the defendants and therefore a risk of inconsistent results for the defendants, and (2) defendants' actions, as alleged in Blumberg's complaint, constituted a common course of conduct toward the plaintiff class and the complaint sought equitable relief. App. 21.

The Court of Appeal dismissed Petitioners' objections that the trial court had made no finding that the

action below was primarily for equitable relief. Instead, the Court of Appeal held that the trial court had "implicitly" found that equitable relief predominated in the action below, and therefore the due process rights of absent class members were not offended by the certification of a mandatory class. App. 22. The Court of Appeal also gave little, if any, weight to the nature of the claims released by the settlement, and instead focused exclusively on the claims asserted in the complaint and the nature of the relief obtained in the settlement, which it found to be predominantly equitable. Although the Court of Appeal acknowledged that the settlement extinguished the claims for damages held by the members of the plaintiff class, the court found that because some equitable relief had been obtained in the settlement, and because the complaint sought equitable relief, a mandatory class did not deprive the plaintiff class of due process. *Id.*

In sum, the Court of Appeal held that, in hybrid class action lawsuits involving claims for both money damages and equitable relief, the trial court has complete discretion to determine whether damages or injunctive relief predominate. If the trial court determines, even "implicitly," that equitable relief predominates, the claims of absent class members for money damages may be forever extinguished as part of a mandatory class settlement, even where the settlement provides them with no consideration of any monetary value.

Following the decision of the Court of Appeal, Petitioners sought review from the California Supreme Court. Petitioners again asserted, *inter alia*, that the due process rights of the plaintiff class had been violated by the certification of a mandatory, non-opt out settlement class

in connection with a settlement that foreclosed substantial damages claims. On May 20, 1998, the California Supreme Court summarily denied the objectors' petition for review. App. 26.

II. REASONS FOR GRANTING THE WRIT

A. This Petition Presents An Important Issue Of Constitutional Law Which Should Be Resolved By This Court

A writ of certiorari should be granted to review the California Court of Appeal's decision because this case presents an important contitutional issue which requires resolution by this Court.

In *Phillips Petroleum v. Shutts, supra,* this Court held that, in a class action lawsuit that seeks predominantly money damages, minimum due process requires that absent class members be allowed to exclude themselves from the lawsuit. In *Brown v. Ticor Title Ins.Co.*, 982 F.2d at 392, the Ninth Circuit Court of Appeals held that where a class action settlement forecloses *substantial* damages claims, the principle enunciated in *Shutts* applies and due process requires that an opt-out right be extended to the members of the class.

In the action below, the complaint asserted claims for both equitable relief and money damages. By the time the settlement was reached, the claims for equitable relief asserted in the complaint were moot because the Roll-Up had already occurred. Accordingly, while the Settlement Agreement, by its terms, released both damages claims

and equitable claims, the claims released, as a practical matter, were virtually exclusively claims for damages. Nevertheless, the trial court approved the mandatory class certification and, although the trial judge made no explicit findings on the issue, the California Court of Appeals held that a mandatory class was permissible because the trial court had *implicitly* found that the equitable claims predominated over any claims for damages.

The issue at stake in this case is what degree of protection the Constitution affords to class members – in this case, over 18,000 class members – who are not in court to protect their own interests. More concretely, should class members who are not in court be put at risk of losing valuable property rights of constitutional dimension based on "implicit findings"?

This issue is far from merely theoretical – it is of widespread importance and considerable practical significance in the administration of justice. Class actions are an important tool for the management of complex litigation. Whether or not a mandatory class is permissible arises, either actually or potentially, in every class action.

The question presented by this Petition is of great importance to the lower courts, which must administer and manage class action litigation, to litigants and practitioners and to innumerable absent class members. Indeed, this Court has twice granted certiorari regarding this issue, only to dismiss the writs as improvidently granted.

In *Ticor Title Ins. Co. v. Brown, supra,* the litigants had fully briefed the issue and the Court had heard oral argument from counsel when the Court determined that

the posture of the case before it was procedurally improper for deciding the issue presented. *Id.*, 128 L.Ed.2d at 38.

The Court held that prudential considerations required it to consider the narrower, non-constitutional question of whether a mandatory class foreclosing substantial damages claims is proper *under the Federal Rules*, before addressing whether or not the constitution permitted the certification of such a class. However, the Court determined that in light of the procedural posture in which the *Ticor* case arose, the litigants were precluded by *res judicata* from arguing, and the Court was therefore foreclosed from considering, that non-constitutional issue. The Court held that it would be inappropriate to decide the constitutional issue on a record on which consideration of the narrower, non-constitutional issue was infeasible.

The problem which caused the Court to dismiss certiorari in *Ticor* is not present here. This case arose under California law rather than under the Federal Rules of Civil Procedure. Accordingly, the issue of whether or not Rule 23 would permit the certification of a mandatory class in a damages case is not before this Court,[7] and the

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[7] While the trial court's class certification order referenced Rule 23 and the Court of Appeal's decision discussed authorities decided thereunder, neither the Rule nor any cases thereunder were relied on as *controlling* precedents but, rather, only for their persuasive value. *See* note 6, *supra*. Therefore, the non-constitutional issue which caused the Court to dismiss certiorari in *Ticor* simply does not arise in this case and, accordingly, presents no obstacle to the consideration of the constitutional issue.

Court is not precluded from considering the constitutional question presented in this Petition.

Only two years after dismissing the writ in *Ticor*, this Court, in recognition of the continuing importance of this issue, once again granted certiorari to consider it in *Adams v. Robertson*, 518 U.S. 1056, 117 S.Ct. 37, 135 L.Ed.2d 1128 (1996). However, the Court dismissed the writ as improvidently granted after determining that the state court below had not had the opportunity to address the constitutional issue presented. *Adams v. Robertson*, 137 L.Ed.2d at 210 (1997). Here, however, the lower courts have heard and decided the issue presented. Accordingly, there is no impediment to this Court's consideration of this issue.

B. The California Court Of Appeal's Decision Deprives Class Members Of Their Due Process Rights

1. Due Process Requires That Class Members Be Permitted To Exclude Themselves From The Class Where Substantial Claims For Money Damages Are To Be Extinguished

This petition should be granted because the decision of the California Court of Appeal conflicts with federal law and deprives petitioners and class members of their substantial claims for monetary damages without due process of law. In *Shutts, supra*, this Court held that due

process rights of an absent class member in a class action predominantly seeking a money judgment are satisfied if the plaintiff receives reasonable notice, an opportunity to be heard and to meaningfully partake in the litigation, adequate representation, and "at a minimum . . . an opportunity to remove himself from the class by executing and returning an 'opt-out' or 'request for exclusion' form to the court." *Id.* at 811-12.

As the Ninth Circuit made clear in *Brown v. Ticor Title*, the due process right to opt out attaches where a mandatory class settlement forecloses damages claims which are *substantial*. Moreover, *Brown* holds that in determining whether the opt-out right recognized in *Shutts* will apply to a class action settlement, one must look at the claims released in – or, in *Brown's* terminology, the claims "foreclosed by" – the settlement.

The decision of the California Court of Appeal below offends against these principles. That decision approves a mandatory class settlement in a case in which the claims released are predominantly for money damages. Moreover, in concluding that equitable claims "predominate" over monetary claims, it focuses unduly on the consideration *received* in the settlement – consideration which concededly was of no monetary value – rather than on the claims released in the settlement. This is error. To determine whether damages or equitable relief predominates, courts should examine *all* claims that would be barred by the res judicata effect of the settlement's release. *See*, H. Newberg and A. Conte, *Newberg on Class Actions*, § 12.17 (3d ed. 1992).

In subjecting an absent class member to a class action settlement, a court employs the judicial power of the government to take away the class members' property rights by enforcing a release of individual claims. The constitutional guarantee of due process, by its very terms, exists to protect the claims possessed by the class members and to ensure that they are not released without adequate procedural and substantive safeguards. *See In re Asbestos Litigation*, 90 F.3d 963 (5th Cir. 1996) at 998-99 (Smith, J., dissenting). Thus, it is the claims released, not the consideration received in the settlement, that due process protects. Accordingly, one must look to the nature and scope of the claims released to determine what process is due.

Here, the claims released included substantial claims for damages. The complaint filed by plaintiff Blumberg asserted claims for money damages and equitable relief. By the time of the settlement, however, the only meaningful relief still available to the members of the plaintiff class was money damages. Blumberg's prayer that the Roll-Up should be enjoined was moot at the time the trial court approved the Settlement because, by that time, the Roll-Up had already been consummated. Obviously, the trial court could not issue an injunction to prevent that which had already occurred.

Moreover, rescission was also unavailable at the time of the settlement. After the Roll-Up was consummated, the REIT's shares began to trade publicly on the New York Stock Exchange. Thus, the class of persons who owned interests in the Partnerships at the time of the Roll-Up was no longer identical to the class of persons

who *now* own stock in the REIT. Rescission would therefore have substantially affected the interests of subsequent purchasers of REIT stock who were not before the court, and was therefore unavailable as a remedy to the class. *Cf. Hoxworth v. Blinder, Robinson & Co., Inc.*, 903 F.2d 186, 209 (3d. Cir. 1990) (defrauded buyer of securities pursuant to a prospectus is entitled to rescission under section 12(2) of the Securities Act if buyer still owns stock, and damages otherwise). Subsequent purchasers would not be entitled to rescind their purchases because any loss they might have suffered by purchasing publicly traded shares could not be connected with the injury defendants inflicted on the Limited Partners. *See In re Worlds of Wonder Sec. Litig.*, 35 F.3d 1407, 1422 (9th Cir. 1994), *cert. denied*, 516 U.S. 868 (1995) ("Loss causation exists where the misrepresentation touches upon the reasons for the investment's decline in value").

Thus, by the time of the settlement, monetary claims were the *only* effective remedy remaining to the members of the plaintiff class. Nevertheless, plaintiff Blumberg released *all* of those claims in the settlement, and provided no opportunity for class members to exclude themselves from that release. Because absent class members could not opt out of the settlement disposing of their monetary claims, their due process rights were violated.

2. Certification Of A Mandatory Class Cannot Be Justified By Reference To Federal Rules Of Civil Procedure 23(b)(1)(A) Or 23(b)(2)

In its discussion of the propriety of mandatory class certification, the California Court of Appeal cited Federal Rules of Civil Procedure 23(b)(1) and 23(b)(2) and precedents decided thereunder. As noted above, these were cited for their persuasive value rather than as controlling authority. In any event, the lower court's references to Rules 23(b)(1) and 23(b)(2) do not justify what was done here, for two reasons. First, as this Court recognized in *Ticor*, 128 L.Ed.2d at 38, even if a mandatory class were permitted under Rule 23 (or under the California statute governing class actions, California Code of Civil Procedure § 382), that would not mean that a denial of the opt-out right is *constitutionally* proper. Accordingly, the Court of Appeal's references to Rule 23 are without merit.

Furthermore, the mandatory class certified in this action *is not* of the type historically allowed under the terms of Rules 23(b)(1) and 23(b)(2).

Rule 23(b)(1)(A) of the Federal Rules of Civil Procedure provides that a class action is maintainable under that section if a separate action would create a risk of "inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class." Fed.R.Civ.P. 23(b)(1)(A). This rule is typically used to certify classes where there is a substantial risk of multiple lawsuits where the outcome of those lawsuits would impair the ability of the party opposing class

certification to pursue a uniform continuing course of conduct. Typically, such situations arise where the opposing party is under a legal duty to treat all class members alike.

The law is clear, however, that the mere fact that some plaintiffs might be successful in individual lawsuits against a defendant while others may not is not a ground for invoking Rule 23(b)(1)(A). *E.g., In re Benedictin Products Liab. Litig.*, 749 F.2d 300, 305 (6th Cir. 1984); *McDonnell Douglas Corp. v. United States District Court for the Central District of California*, 523 F.2d 1083, 1086 (9th Cir. 1975), *cert. denied*, 425 U.S. 911 (1976); *In re "Agent Orange" Products Liab. Litig.*, 100 F.R.D. 718, 724-25 (E.D.N.Y. 1983), *petition for mandamus denied sub. nom. In re Diamond Shamrock Chemicals. Co.*, 725 F.2d 858 (2d Cir.), *cert. denied*, 465 U.S. 1067 (1984).

In the action below, the primary claims asserted in the litigation and extinguished by the settlement below are for money damages. The risk of inconsistent adjudications resulting from individual actions for money judgments does not warrant certification of a mandatory, non-opt out class under Rule 23(b)(1)(A). The trial court's purported finding that class certification was proper by analogy with Rule 23(b)(1)(A) is therefore insupportable.

Nor is the class certified here of a type that has historically been certified under Rule 23(b)(1)(B). That rule provides for certification of a class where adjudications by individual class members "would as a practical matter be dispositive of the interests of the other members [of the class] not parties to the adjudications . . . " Fed.R.Civ.P. 23(b)(1)(B). Although many courts have held

that a limited fund theory justifies a mandatory class under that rule, there is no limited fund in this case. Nor did the trial court conduct any fact-finding inquiry as to the existence of a limited fund, as it must in a Rule 23(b)(2) case. *See, e.g., In re Asbestos Litig.*, 90 F.3d at 983 (5th Cir. 1996); *In re Joint Eastern and Southern Dist. Asbestos Litig. (Findley)*, 982 F.2d 721, 739 (2d Cir. 1992); *In re Benedictin*, 749 F.2d at 306; *In re Dalkon Shield IUD Products Liab. Litig.*, 693 F.2d 847, 852 (9th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983); *In re "Agent Orange,"* 100 F.R.D. at 727.

Rule 23(b)(2) is equally inapposite. That Rule provides that a class may be certified where "the party opposing the class has acted on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole . . . " Fed.R.Civ.P. 23 (b)(2).

The Advisory Committee to Rule 23 stated that Rule 23(b)(2) is intended "to reach situations where a party has taken action or refused to take action with respect to a class, and final relief of an injunctive nature . . . is appropriate." Advisory Committee Notes to Proposed Amendments to Federal Rules of Civil Procedure, 39 F.R.D. 69, 102 (1966). The Advisory Committee illustrated the application of proposed Rule 23(b)(2) with reference to civil rights actions and patent litigation seeking specific or declaratory relief. *Id.* However, a class certified under this rule cannot be justified on the grounds that the case below is one in which the relief sought is "primarily declaratory or injunctive relief." *Id.*

As discussed above, at the time of the settlement, only claims for money damages remained. The equitable relief sought by the complaint had been rendered moot. Minor corrections to the Roll-Up prospectus and insignificant delays in the issuance, sale or purchase of stock or stock options comprised the only consideration received in the settlement. The price paid by the members of the plaintiff class was the extinguishment of all claims for money damages arising out of the Roll-Up.

In examining whether an action is "primarily" one for injunctive and declaratory relief under Rule 23(b)(2), courts look to whether the monetary relief requested is either (1) equitable in nature or (2) secondary or ancillary to the declaratory relief sought. *Newberg on Class Actions, supra,* at § 4.14. Thus, for example, an action may be certified under Rule 23 (b)(2) in employment discrimination class actions where back-pay is requested in addition to injunctive relief. Such cases are certified under the theory that back-pay is nothing more than "equitable restitution" directly flowing from the injunctive relief. *See, e.g., Probe v. State Teachers' Retirement System,* 780 F.2d 776 (9th Cir), *cert. denied,* 476 U.S. 1170 (1986).

Here, the trial court made no finding that this action was primarily for injunctive relief. Indeed, no such finding could have been made because the complaint explicitly sought *compensatory damages.* Such damages are not equitable, nor are they ancillary to the injunctive relief prayed for. *See e.g., Williams v. Owens Illinois, Inc.,* 665 F.2d 918 (9th Cir.), *cert. denied,* 459 U.S. 971 (1982) (trial court properly refused to certify compensatory damage claims in employment discrimination case). Thus, this

case was not one seeking "primarily injunctive relief," and it was error to certify a mandatory settlement class.

Brown v. Ticor Title Insurance Company, supra, 982 F.2d at 392, illustrates this point. In *Brown,* the plaintiffs sought treble damages and an injunction against a title insurance company for alleged antitrust violations relating to title search and examination fees. The trial court approved a mandatory class settlement that extinguished the monetary claims and provided for an injunction and other related relief. *Id.* at 398.

The Ninth Circuit Court of Appeals held that the mandatory class provision, insofar as it related to monetary relief, violated absent class members' due process rights. *Id.* at 392. In determining whether the claim was "primarily" for injunctive relief, the Court followed the Third Circuit's holding that the litigation was "a hybrid suit that involved the *foreclosure of substantial damage claims.*" *Id.* (emphasis in the original). Because class members were not provided the right to opt out, the appellate court held that claims for monetary damages could not be barred.

Brown v. Ticor Title is directly on point here. The mandatory settlement class certified here "foreclose[d] . . . substantial damage claims" of absent class members without giving them an opportunity to opt out of the class. Accordingly, the certification of a mandatory class in this action violated the due process rights of absent class members and, accordingly, merits review by this Court.

C. Review Is Necessary To Resolve A Conflict Between The Federal And State Courts, And Among The Federal Circuits

Finally, this Court should grant a writ of certiorari to resolve a conflict between the federal and state courts, and among the federal circuits, on an important constitutional issue. The resolution of such conflicts has long been held to be a compelling justification for the issuance of a writ of certiorari. 16B Wright, Miller & Cooper, *Federal Practice & Procedure: Jurisdiction 2d* § 4017 at 270 (1996). *See, e.g., Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 826 (1988) (certiorari granted to resolve a conflict among the courts); *Washington v. Washington State Commercial Passenger Fishing Vessel Assn.*, 443 U.S. 658, 674, 99 S.Ct. 3055, 61 L.Ed.2d 823 (1979), *modified* 444 U.S. 816, 100 S.Ct. 34, 62 L.Ed.2d 24 (1979) (certiorari granted to resolve conflict between the state and federal courts).

There is a direct conflict between the Ninth Circuit's decision in *Brown v. Ticor Title, supra,* and the California Court of Appeal's ruling below. *Brown* holds that the Due Process Clause forbids the courts from approving a mandatory class settlement without extending an opt-out right to all class members, where the settlement forecloses substantial damages claims. *Accord, Epstein v. MCA, Inc.*, 126 F.3d at 1242. The Court of Appeal's decision herein is directly to the contrary, holding that as long as a trial judge has made an "implicit finding" that equitable claims predominate, a mandatory class settlement is constitutionally permissible even if the settlement forecloses substantial damages claims. The Court of Appeal's decision relies on the prior California case of *Bell v. American Title Co., supra,* which similarly resolves the

federal constitutional issue in a manner which contradicts the Ninth Circuit's holding in *Brown*.

There is also a conflict between the federal circuits. In *Grimes v. Vitalink, supra,* the Third Circuit held that a mandatory class settlement is permissible, even where the settlement forecloses substantial damages claims, as long as the court has *in personam* jurisdiction over the absent class members. This holding as well is directly contrary to the Ninth Circuit's holding in *Brown* and *Epstein* that the due process right to opt of a class or a class action settlement which forecloses substantial damages claims is not limited to those persons over whom the trial court lacks *in personam* jurisdiction but, rather, extends to all class members. The Ninth Circuit has expressly held that it rejects the Third Circuit's holding in *Grimes*. *Epstein,* 126 F.3d at 1242.

Petitioners submit that the Court should grant certiorari to resolve these conflicts.

III. CONCLUSION

For the foregoing reasons, this Court should issue a writ of certiorari to review the judgment of the California court.

Dated: August 18, 1998

Respectfully submitted,

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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FOUR

DONALD BARNETT et al., Plaintiffs and Appellants, v. GLENBOROUGH REALTY CORPORATION et al., Defendants and Respondents; ANTHONY BLUMBERG, Plaintiff and Respondent.	A075278 (San Mateo County Super. Ct. No. 391223) (Filed Feb. 17, 1998)

This is an appeal from an order approving settlement of a class action brought on behalf of limited partner unitholders in eight real estate limited partnerships.[1] The lawsuit challenged a proposed "roll-up" transaction

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[1] Appellants herein are six plaintiff class members and objectors to the settlement (hereafter, objectors). Respondents are Anthony Blumberg, named plaintiff, and Glenborough Realty Corporation (GRC), Glenborough Corporation (GC) and Robert Batinovich (sometimes referred to collectively as "Glenborough").

At the time of the proposed rollup, Batinovich was president of GRC and owned and controlled GC. GRC in turn was wholly owned by GC.

whereby the limited partnerships and GC would merge into a newly created real estate investment trust (REIT) called Glenborough Realty Trust Incorporated (GRTI). In simple terms, the limited partnership interests would be converted into shares of the publicly traded REIT. Among other things, the complaint charged that the proposed allocation of REIT shares among the general partners and the limited partners was unfair.

We conclude that the trial court did not abuse its discretion in approving the settlement and accordingly affirm the judgment.

I. BACKGROUND

The limited partnerships were formed between 1979 and 1988. GRC assumed management of all partnerships during the period 1989-1991.

The offering materials for the limited partnerships contemplated investment holding periods of between three and fifteen years, after which the assets would be liquidated and the proceeds distributed to the limited partners. The limited partners were also entitled to preferred annual returns, and if the returns were not actually paid annually, they would accumulate.

At the time of the proposed rollup, only two of the eight partnerships had returned the limited partners' original investment. Limited partnership units were traded sporadically in the secondary market. During the period 1992-1995, trading of the units was at a deep discount from the original cost and the net assessed value.

In September 1994, GRTI filed a "Form S-4" registration statement (S-4) with the Securities and Exchange Commission (SEC) and several amendments followed. The S-4 proposed a rollup whereby the limited partnerships and GC would merge with and into the REIT. In exchange, the REIT would issue shares of common stock to the limited partners as well as to the shareholders of GC. The S-4 also identified three levels of allocation of interests in the REIT: level 1, between the limited partnerships as a group and GC; level 2, among the partnerships; and level 3, between the general partners and the limited partners of each partnership.

Blumberg, on behalf of himself and all holders of units of the limited partnerships – alleged at approximately 18,000 – filed suit on February 21, 1995, charging that through the rollup, the general partners would convert ownership of a worthless management company – GC – into a 22-28 percent interest in the REIT. Specifically, the level I allocation called for an excessive allocation of ownership in the REIT to GC. Further, the rollup would prevent the limited partners from selling their assets for profit. Finally, the complaint alleged that the general partners cooked up the rollup to perpetuate their ability to earn management fees and other consideration. The complaint alleged causes of action for breach of fiduciary duty and the duty of good faith and fair dealing and sought injunctive and declaratory relief, an [sic] accounting and compensatory damages.

In mid-March 1995 counsel for Glenborough inquired about exploring settlement. Glenborough agreed to provide certain critical information without formal discovery, and further agreed not to " 'go effective' " with the

registration statement on a schedule that would inhibit the right to formal discovery, if necessary. Meanwhile, Blumberg's counsel retained a financial expert from Coopers & Lybrand.

Discussions to explore settlement commenced April 6, 1995. Thereafter, Glenborough provided Blumberg's counsel with SEC comments on the registration statement and other requested information. Discussions at the second meeting focused primarily on the level I allocation and Blumberg's claim that it was unfair. Glenborough argued that additional cash flow being provided under a newly closed acquisition not reflected in the then-current registration statement (the Rancon transaction) would justify allocation of shares to GC of approximately 29 percent, but it nonetheless would *leave* the allocation at the proposed pre-Rancon level of 20.2 percent.

Following that meeting, Blumberg's team reviewed the revisions to the transaction and the valuation concepts. It preliminarily concluded that with the inclusion of the new cash flow, the proposed transaction was approaching a range of reasonableness when compared with similar transactions. The team decided to undertake further investigation and analysis, including analysis of three comparable transactions referenced in the registration materials and compilation of information concerning trading prices and earnings multiples of publicly traded REIT's. As well, the team obtained more information about contributed debt, GC expenses and the fairness opinion rendered in connection with the transaction. Thereafter, Blumberg's team met with its financial expert to analyze the information. It concluded that with the

inclusion of the Rancon cash flow, the level I allocation came within the range of reasonableness.

Additional meetings, communications and information exchange took place. At the close of an hour and a half conference call with defense counsel on June 21, 1995, the parties reached an agreement in principle on the terms of a settlement which emphasized additional disclosures and additional restrictions on the sale of shares by Batinovich.

The process of documenting the agreement was extensive, resulting in exchange and review of numerous drafts. The parties executed the final settlement agreement in October 1995. Pursuant to the settlement, all claims of the limited partners relating to the rollup – for equitable relief as well as money damages – were resolved and Glenborough was released from all liability. The settlement class – consisting of all persons holding units of the limited partnerships – was mandatory – i.e., no one could opt out of the settlement or otherwise exclude themselves from the final judgment. Under the settlement, the limited partners would receive no economic consideration for release of their claims. Benefits were limited to additional disclosures and certain restrictions relating to REIT stock or stock options.

On October 11, 1995, the court entered an order certifying a settlement class, approving notice of the proposed settlement and setting the hearing for December 21, 1995. Some 13 class members lodged objections to the settlement. The trial court continued the hearing to January 17, 1996, and thereafter accepted additional briefing from objectors and responses from Blumberg and defendants.

Ultimately, the trial court approved the settlement and this appeal followed.

Meanwhile, the final prospectus/consent solicitation for the rollup was issued on October 26, 1995. It set a December 28, 1995, deadline for voting on the transaction. The rollup transaction closed, with some 80 percent of those who voted on the proposal voting, in favor of the transaction.

II. STANDARD OF REVIEW

Settlement of a class action requires judicial determination that the settlement is fair, adequate and reasonable. Court approval is required in order to prevent fraud, collusion or unfairness to class members. *(Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1800-1801.)

The trial court has broad discretion to determine the fairness of a proposed settlement. Thus in reviewing, a settlement we should refrain from deciding the merits of the case, confining our task to a review of the lower court's approval for a clear abuse of discretion. We do not substitute our notion of fairness for that of the trial court or the parties to the agreement. *(Dunk v. Ford Motor Co., supra,* 48 Cal.App.4th at p. 1802 & fn. 8.)

In exercising its discretion the trial court should consider the relevant factors, including, the strength of plaintiffs' case – the risks, complexity, expense and probable duration of further litigation; the risk of maintaining the class action through trial; the amount offered in settlement; the extent of completed discovery and stage of proceedings; the experience and views of counsel and the

reaction of class members to the proposed settlement. (*Dunk v. Ford Motor Co., supra,* 48 Cal.App.4th at p. 1801.)

III. THE SETTLEMENT WAS FAIR

A. The Strength of Plaintiffs' Case

Objectors claim that the rollup was so grossly unfair to the limited partners that it constituted a clear breach of fiduciary duty owed by Glenborough to them. Thus, they conclude their case is strong. Objectors present us with an exhaustive analysis of the minute details of the transaction and the factors considered by the trial court. But they fail to account for the well-developed record below, including substantial evidence from respondents' experts that supports the fairness decision. Under the abuse of discretion test, we employ the equivalent of the substantial evidence test when it comes to accepting the trial court's resolution of credibility and conflicting substantial evidence and choice of reasonable inferences. *In re Executive Life Ins. Co.* (1995) 32 Cal.App.4th 344, 358; see *Shamblin v. Brattain* (1988) 44 Cal.3d 474, 478-479.

1. The Level 1 Allocation

Objectors first contend the level 1 allocation was unfair because allocation of REIT shares between the limited partners and GC was based on cash flow instead of a fair market valuation of the assets of the respective entities. They point to affidavits of their experts which averred that the cash flow method ignores significant facts such as net asset value and does not adequately account for differing risk levels of the entities' respective

cash flows. Acknowledging the difficulty of valuing the parties' respective interests, the trial court found that the cash flow approach, rather than relative asset valuation, was economically more realistic and the method generally adopted in similar situations.

Objectors disregard respondents' evidence. In particular, Glenborough's expert opined that funds from operation (or cash flow) is one of the most commonly accepted tools for valuing real estate securities. In addition, Blumberg's expert declared that allocation to management companies based on cash flow is an appropriate allocation methodology. Further, a financial and management consultant company (the Stanger firm) that delivered a fairness opinion on aspects of the REIT transaction also declared that the allocation methodology for the rollup "is similar to and produces results consistent with other similar transactions." Moreover, there was evidence that Glenborough discounted its cash flow more heavily than did the limited partnerships. This is because GC received 20.2 percent of shares issued by the REIT while contributing 29.5 percent of the cash flow contributed to the REIT.

Objectors also complain that the method of calculating GC's cash flow improperly relied on the results of a single year (fiscal 1994), a choice biased in favor of Glenborough. The record reveals to the contrary that Glenborough's cash flows were adjusted to exclude extraordinary and nonrecurring transactions, and that the cash flows used for allocation purposes were *less than* the annualized operating cashflow of GC for the six months ending June 30, 1995. Thus, as the Stanger Firm stated, the cash flows actually used were developed with a general bias to the partnerships, not Glenborough, So, too,

there was evidence to refute objectors' contention that Glenborough ignored the limited partnerships' improved cash flow. The prospectus showed that for purposes of level 1 allocations, they received credit for nearly $600,000 more in cash flow than they generated during the base fiscal year, in order to reflect those very improvements.

Objectors also attack the value imputed to GC as vastly overstated. They argue that since GC had a negative book value, it could not possibly have the positive fair market value attributed to it. Again, their position ignores GC's cash flow contribution, since the market values the REIT on its ability to pay cash dividends. The record shows that GC contributed substantial intangible assets to the REIT in the form of revenue streams from long-term management contracts, most of which came from sources outside the participating limited partnerships.

Objectors further contend that the Rancon transaction did not improve matters or affect the allocation of shares at level 1. Again, this is a variation on their argument that Glenborough should have used net asset value rather than cash flow at this level. Objectors also suggest that Glenborough is claiming credit for the assets but not the cost associated with the transaction. But Glenborough did adjust cash flow for both the income and debt. Moreover, it did not purchase the Rancon partnerships – it contracted to have an affiliate that participated in the rollup perform management services for the Rancon partnerships.

2. The Level 2 Allocation

Objectors also charge that the level 2 allocation, which generally apportioned REIT shares among the limited partnerships in proportion to net asset value, was unfair. One of the partnerships, called "GPA" which indirectly owned four warehouse properties, was owned in substantial part by Glenborough. Instead of receiving REIT shares, GPA was to receive units in the operating partnership that held most of the REIT assets.

The assets of the operating partnership consisted of assets net of liabilities contributed by the REIT, and assets net of liabilities contributed by GPA. The liabilities contributed by the REIT included not only the debts of the limited partnerships (already reflected in their net asset value calculations), but also a $13 million debt of GC which it assumed in the rollup. This means that the net asset value contributed by the REIT to the operating partnership was *less* than the net asset value contributed by the limited partnerships to the REIT.

The result is that although GPA represented approximately 10.5 percent of the combined net asset value of all partnerships, it represented 13 percent of the combined net asset value contributed to the operating partnership and thus received a 13 percent interest therein. Objectors claim it is unfair to use cash flow as the basis for level 1 allocation, which imputes a positive value to GC, and then use net asset value, which subsumes GC's debt, to allocate interests in the operating partnerships. This switch in methodologies, they claim, works to GPA's advantage.

As Glenborough points out, however, the REIT itself holds interests in both the operating partnership and other entities (called associated companies) that performed property management for the REIT, as well as properties owned by unrelated third parties. The record reveals that the operating partnership *has no interest in the associated companies.* Thus, as one of Glenborough's experts explained, the shares of the operating partnership are not as valuable as REIT shares because they will not receive any dividends from the associated companies. The minor difference between the percentages of net asset value (10.5 percent) and shares in the operating partnership (13 percent) reflects this value differential.[2]

Objectors also challenge the $8 million net asset value attributed to GPA. Glenborough retained the Stanger firm to appraise the real estate assets of every partnership involved in the rollup, including GPA. Glenborough's evidence is to the effect that this appraisal followed industry norms – site visits, interviews with management, review of rent rolls, collection on market rental rates, rental projections, and use of appropriate capitalization and discount rates. Objectors further hint that because GPA's predecessor instituted voluntary bankruptcy proceedings in 1992, and since GPA's financials were not included in the prospectus, the partnership was not financially sound. But because GPA was not contributing cash flow to the REIT, the income statement was not

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[2] We note that GPA's interest in the operating partnership carried redemption rights which, after a period of at least one year, would entitle GPA to exchange its interest in the operating partnership for REIT shares of equal market value.

germane to the rollup. Further, the predecessor apparently shed liabilities during the bankruptcy reorganization.

Finally, objectors complain that the Stanger firm did not opine on the fairness of the level 2 allocation to the partnerships. The firm did opine that allocation of shares among the eight limited partnerships was fair to the limited partners of those partnerships from a financial point of view. The opinion also stated that allocation of units in the operating partnership between the REIT and GPA was fair to GPA. Objectors are right that Stanger did not opine as to allocation between the partnerships on the one hand and GPA on the other, but to do so would be mixing apples and oranges because the interests – REIT shares and limited partnership units – are different.

3. *Change in Nature of Investment*

Objectors also argue that the settlement was unfair because the rollup changed the status quo, effectively eliminating the prospect of liquidating the partnerships under their original timetables, and instead perpetuating Glenborough's ability to earn management fees.

The trial court found otherwise, noting that the limited partners invested in "highly illiquid" partnerships. The rollup of course rendered the investment more liquid, with REIT shares that can now be publicly traded. Moreover, as Glenborough points out, with the rollup the former limited partners can share in management fees, including those generated from Glenborough's management of the Rancon partnership, and the rollup would

provide greater diversification by type of property for more partners. Moreover, there was evidence that bulk liquidation of partnership assets would result in discounts that would exceed the entire cost of the REIT transaction. And, gradual liquidation would erode the return to investors due to the ongoing costs of administering the partnerships.

4. Benefit to Glenborough

Next objectors argue the court should not have approved the settlement because Glenborough benefited disproportionately from the transaction. They specifically cite liabilities eliminated by the rollup and tax benefits not shared by the limited partners.

$4.3 million in released liabilities represented contingent personal guaranties given by Batinovich on debts of the limited partnerships. The guaranties were given in the first instance to enable the partnerships to obtain loans, and of course they have realized the proceeds and are primarily liable for the debts. An additional $14.3 million of Glenborough's non-real estate debt was assumed by the REIT. But Glenborough offset the interest on this debt against its cash flow contribution for purposes of calculating the allocation of REIT shares. Finally, the potential tax liabilities deferred or eliminated with the rollup were highly speculative.

5. Transaction Costs

Finally, objectors complain that it was unfair to foist at least $2.9 million in transaction costs on the limited

partnerships. This argument overlooks the fact that the costs of the REIT were shared by all participating entities and were lower than costs associated with liquidation.

B. The Relief Offered in the Settlement

The relief offered in settlement is another important factor which the trial court must consider in approving a class action settlement. Objectors claim they received no economic value and that the other purported benefits – additional disclosures and restrictions on selling shares – were illusory. They point to a number of federal decisions where proposed settlements were disapproved in part because class members received no economic value but counsel or named plaintiffs did. (See, for example, *In re General Motors Corp. Pick-up Truck Fuel Tank* (3d Cir. 1995) 55 F.3d 768, 803 [criticized by *Dunk v. Ford Motor Co., supra,* 48 Cal.App.4th at pp. 1803-1804 for *reweighing* the fairness factors]; *Plummer v. Chemical Bank* (2d Cir. 1982) 668 F.2d 654, 660.)

As to the disclosures, objectors first argue that they were not really new because they appeared in previous versions of the prospectus. The record reveals that all were added in late June 1995 at the request of Blumberg's counsel.

The structural changes consisted of provisions designed to limit the downward pressure on the price of REIT stock when issued and to avoid undue future dilution of class members' interests. The first was an extension of the lockup period on REIT shares to be owned by Glenborough management. Although the lockup could be

waived by the REIT, the REIT itself was to be governed by a board of directors with a majority of independent directors. The compensation committee, consisting of three independent directors, would make any recommendations concerning salaries and incentives and would have to approve the waiver.

The remaining restrictions had to do with options to purchase REIT stock. They extended the period prohibiting issuance of any options and set a floor on the option exercise price. These restrictions, which could not be waived by the REIT, were designed as an incentive to keep the REIT stock price at or above the option price.

That the disclosures and transfer limitations were in place before approval of the settlement does not mean they are worthless because the evidence shows they were brought about during the settlement process. Moreover. the absence of monetary relief does not mean the settlement lacked benefit as to the limited partners. (See *Rebney v. Wells Fargo Bank* (1990) 220 Cal.App.3d 1117, 1139 [no fairness problem where monetary relief paltry but primary focus was on prospective relief].)

Finally, the focus on disclosures and structural aspects of the transaction was appropriate given the change in cash flow contributions of Glenborough fostered by the Rancon deal. In fact the record shows that these structures had a beneficial effect because the stock prices during the initial trading staved in a narrow band of approximately 85 percent of the $15 per share exercise price.

C. Discovery and Stage of the Proceedings

Settlement negotiations began early in the proceedings, but it must be remembered that once the SEC declared the registration statement effective, the rollup could close within 60 days. Although there was no formal discovery, there was ample informal documentary discovery to enable class members to make an informed judgment on the strengths and weaknesses of their case. These factors did not militate against approval of the settlement.

D. Experience and Views of Counsel

Blumberg was represented by counsel with significant experience in complex financial transaction litigation, including rollups. Indeed, two of the firms collaborated on a case involving a comparable transaction completed in 1994-1995.

E. The Expense, Risk, Complexity and Likely Duration of Further Litigation

This was a complex case with complex financial issues that would necessitate substantial expert testimony from both sides. The record generated for the settlement process is testimony to this state of affairs. Glenborough denied wrongdoing, and, in the absence of settlement negotiations, would have vigorously defended the rollup.

F. The Risk of Maintaining Class Action Status Through Trial

This factor does not weigh in favor of settlement because it appears Blumberg's counsel thought the action would meet the requirements for class action treatment.

G. Reactions of Class Members

Out of a class of some 18,000, only 13 members objected. Only 6 of the 13 have pursued an appeal. Quite a low level of dissent!

IV. THE SETTLEMENT WAS NOT TAINTED

Objectors also urge that the court should not have approved the settlement because there was evidence that the class attorneys sacrificed the rights of the class for their benefit, citing, *Ficalora v. Lockheed California Co.* (9th Cir. 1985) 751 F.2d 995, 996-997. They point to the fact that pursuant to the settlement agreement, Glenborough agreed not to oppose Blumberg's request for a $5,000 "incentive award" and counsel's request for fees and expenses up to the amount of $850,000. These items were payable by the REIT.

The record shows that there was no discussion of fees or incentives until after the parties reached agreement on the substance of the settlement. Further, the settlement agreement set maximum awards, subject to the trial court's discretion to modify the requested amounts. At the hearing, Blumberg's counsel indicated that the court could approve the settlement and deny the fees, pointing

out that the two issues were independent and negotiated separately per decisional law. Counsel further pointed out that the multiplier was below that recently approved in another injunctive relief settlement. The court in turn examined the requests and found that they were fair and reasonable. Objectors have not appealed the fee or incentive awards. Objectors' contention concerning the fees has no merit.

V. CERTIFICATION OF A MANDATORY CLASS DID NOT VIOLATE OBJECTORS' DUE PROCESS RIGHTS

The trial court certified a settlement class consisting of all persons holding units of limited partnerships as of a certain record date and further ordered that the settlement class was mandatory, thereby precluding members from opting out of the settlement class. Objectors contend that certification of a non-opt-out class violated the due process rights of absent class members. We disagree.

In *Phillips Petroleum Co. v. Shutts* (1985) 472 U.S. 797 (*Shutts*), the United States Supreme Court held that in order to bind absent plaintiffs in a class action for money damages or similar relief, minimal procedural due process protection requires that these plaintiffs be given an opportunity to opt out of the class (*Id.* at pp. 811-812.) The court went on to specifically limit this holding "to those class actions which seek to bind known plaintiffs concerning claims wholly or predominately for money judgments. . . . " (*Id.* at p. 811, fn. 3.)

Objectors rely on *Brown v. Ticor Title Ins. Co.* (9th Cir. 1992) 982 F.2d 386. There, the Ninth Circuit held that in

cases of hybrid suits involving substantial damage claims, minimal due process requires that absent plaintiffs be afforded the opportunity to remove themselves from the class. Accordingly, although plaintiff Brown was bound by the injunctive relief provided by settlement of a class action, because he had no chance to opt out, res judicata would not bar his claim for monetary damages.[3] (*Id.* at p. 392.)

Respondents rely on *Bell v. American Title Ins. Co.* (1991) 226 Cal.App.3d 1589 (*Bell*). One question presented was whether the granting of settling defendant's request to preclude opt outs from the class violated plaintiffs' due process rights. The court concluded *Shutts*, by its terms, did not compel a due process right to opt out of the class action. Unlike *Shutts*, the suit in question sought both equitable and monetary relief and thus it was within the trial court's discretion to find the case was not predominantly for monetary relief. The *Bell* court further noted

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[3] The Supreme Court granted certiorari to review the Ninth Circuit's decision. The question presented was whether a federal court could refuse to enforce a properly certified prior federal class action judgment on the ground that absent class members have a due process right to opt out of any class asserting monetary claims on their behalf. (*Ticor Title Ins. v. Brown* (1994) 511 U.S. 117.) However, a *per curiam* court dismissed the writ as improvidently granted based on very convoluted reasoning concerning the possibility of a nonconstitutional ground for decision that nonetheless was not available to the parties. (*Id.* at pp. 120-121.) Objectors characterize this opinion as confirming that *Brown* extends an opt-out right where class action settlement forecloses substantial damage claims. All the court did was characterize the contention that the Ninth Circuit accepted; it neither confirmed nor disapproved of the contention.

that cases which had addressed the effect of *Shutts* on mandatory classes under Federal Rules of Civil Procedure,[4] rule 23(b)(1) and (b)(2) (28 U.S.C.) determined there is no due process opt out for such classes. (*Bell, supra,* 226 Cal.App.3d at pp. 1609-1610.) The *Bell* court concluded it was within the trial court's discretion to treat the action as falling within the scope of rule

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[4] All further references to rules are to the Federal Rules of Civil Procedure.

Rule 23 establishes three types of class actions. In subdivision (b)(1) and (b)(2) classes, there is no right to opt out, while with subdivision (b)(3) actions, class members are entitled to individual notice of the right to opt out of the class. (Rule 23(c)(2).)

Rule 23(b)(1) pertains where "the prosecution of separate actions by or against individual members of the class would create a risk of [¶](A) inconsistent or varying, adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or [¶](B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests. . . . "

Rule 23(b)(2) applies where "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole. . . . "

Finally, rule 23(b)(3) applies where "questions of law or fact common to the members of the class predominate over any questions affecting only individual members" and the class action device "is superior to other available methods for the fair and efficient adjudication of the controversy. . . . "

23(b)(1)(A) or (b)(2), and that such treatment was consistent with the general rule favoring certification under (b)(1) and (b)(2) in order to assure the res judicata effect of the judgment. (*Bell, supra* 226 Cal.App.3d at pp. 1604-1605, 1608.) And, rule 23(b)(2) cases are not limited to actions requesting only injunctive or declaratory relief; they may also include requests for money damages, so long as the final relief does not relate predominantly to money damages. (*Bell, supra,* at p. 1605.)

Here, the trial court certified the settlement class pursuant to Code of Civil Procedure section 382 and rule 23(b)(1) and (b)(2).[5] This was appropriate. First, there was a likelihood of separate actions and, in fact, shortly after the court entered its preliminary order a separate action challenging the rollup was filed in federal court. At the time of certification, there was thus a risk of inconsistent adjudications which could create potential conflicts for Glenborough, e.g., concerning required disclosures in the prospectus which would have to be disseminated class-wide, allocation of REIT shares, etc.[6] Second, Glenborough's action in proposing the rollup constituted a common course of conduct toward all holders of limited

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[5] Our Supreme Court has directed state courts to follow rule 23 whenever California authority is lacking. (*City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, 453.) As noted in *Bell,* Code of Civil Procedure section 382 does not address when the trial court should afford an opt out right. (*Bell, supra,* 226 Cal.App.3d at p. 1603.)

[6] Objectors argue that since the rollup has already occurred, the possibility of conflicting adjudications on equitable grounds is moot. However, at the time the court certified the class, the rollup was not a done deal.

partnership interests and the class action sought corresponding equitable and declaratory relief to stop or rescind the rollup.

By affording the class rule 23(b)(2) status, the trial court implicitly found that the action was primarily for equitable relief. (See *Bell, supra,* 226 Cal.App.3d at p. 1606.) The complaint itself sought to enjoin consummation of the rollup, or, if the rollup closed, to rescind it absent a fair market evaluation of GC's assets. It further asked for an accounting and for compensatory damages. The settlement itself provided for nonmonetary relief. Of course damage claims were extinguished, but so, too was the right to hold up the rollup! The court did not abuse its broad discretion in implicitly deciding that equitable relief predominated.[7]

Objectors argue nonetheless that respondents are "judicially estopped" from pressing that this case is not predominantly for monetary relief, because counsel for Glenborough argued in the federal case that damages

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[7] Objectors contend that no such finding, was made, nor could it be made because respondents simply presented the court with an ex parte order granting preliminary approval of the proposed settlement, which included a clause certifying a mandatory class. The preliminary order also certified the class under rule 23(b)(2), which, pursuant to *Bell,* includes the implicit finding that equitable relief predominates. At that time the court had before it the complaint and the proposed settlement. Following the preliminary order, 13 class members came forward and argued against the settlement, some objecting to the no opt out provision. Thus by the time of final approval of the settlement, the court had the benefit of argument from both sides on the matter. Further, the issue of a mandatory class was argued at the hearing.

were the thrust of that action. We are not sure what point objectors are making. First, counsel's argument is not an admission or stipulation, judicial or otherwise. Second, the matter they reference was the hearing on the request of BEJ Equity Partners[8] for a temporary restraining order and injunctive relief! Of course counsel was arguing *against* the granting of this extraordinary remedy of injunctive relief, emphasizing the availability of a damages remedy instead. And, in any event counsel's argument does not establish the nature of the action.

Objectors further urge that *Bell* does not control because it predates the Ninth Circuit's opinion in *Brown*. While federal circuit court precedent on issues of federal law is entitled to substantial deference, it is not binding. (*Yee v. City of Escondido* (1990) 224 Cal.App.3d 349, 1351.) We find *Brown* unpersuasive to the extent it attempts to establish something other than the predominance test announced in *Shutts*. *Bell* says that *Shutts* applies when the class action is predominantly for monetary relief. In hybrid cases where the claim for monetary relief does not predominate over claims for injunctive and declaratory relief, due process is satisfied *without* the opt out right where objectors are adequately represented by named plaintiffs; represented by a qualified attorney – provided with notice of the proposed settlement; given an opportunity to object; and assured that settlement will not go forward unless the trial court determines it to be fair, adequate and reasonable. (*Bell, supra,* 226 Cal.App.3d at

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[8] BEJ Equity Partners was a holder of limited partnership units and one of the 13 class members who initially objected to the class settlement.

p. 1589.) All these elements ensuring due process were present in this case.

VI. PRELIMINARY APPROVAL OF THE SETTLEMENT

Objectors finally maintain that "preliminary approval of the settlement" was improper, thereby rendering final approval an abuse of discretion. They brief three points. First, they assert the trial court violated its local rules by certifying the settlement class on an ex parte application rather than by noticed motion. Any error was harmless. All class members received notice of the fairness hearing and had an opportunity to submit opposition and address the merits of the settlement. No prejudice attaches to the purported procedural irregularity because the hearing on the trial court's final approval was fair.

Second, objectors contend the trial court ignored Code of Civil Procedure sections 527 and 529 by issuing a preliminary injunction prohibiting class members from filing other suits without requiring the applicant to provide notice, to file a verified complaint or affidavit, or post a bond. Objectors argue that the preliminary injunction was not harmless error because it "handcuffed" the limited partners from bringing a separate action in superior court and presenting their own "motion" to enjoin the rollup. Realistically, any such action or motion most likely would have been coordinated with the Blumberg action. And, we are talking about a very narrow window of opportunity – approximately three months from the court's preliminary order and the fairness hearing. Moreover, BEJ Equity Partners did commence an action in

federal court prior to the fairness hearing. Again, since the trial court here ultimately concluded that the settlement, including its injunctive provisions, was fair, no prejudice attached to the purported procedural lapse.

Third, objectors assert that at the time respondents initially sought approval of the settlement, it misrepresented the nature of the benefits to be derived therefrom. In both examples cited by objectors, time periods relating to restrictions on the sale of stock and issuance of options were extended for the benefit of the limited partners. The settlement agreement describes these benefits without mentioning that Glenborough had already agreed to lesser periods.

Objectors make this out to be an intentional omission. To begin with, we do not know what was discussed at the ex parte hearing requesting preliminary approval. Moreover, since objectors fully participated in opposition to final approval, we fail to see any harm coming from this alleged misrepresentation.

We affirm the judgment.

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Reardon, J.

We concur:

_____

Hanlon, P.J.

_____

McGuiness, J.

First Appellate District, Division Four, No. A075278
S069109

IN THE SUPREME COURT OF CALIFORNIA

DONALD BARNETT Et Al., Appellants

v.

GENBOROUGH REALTY CORPORATION Et Al., Responents

ANTHONY BLUMBERG, Respondent

(Filed May 20, 1998)

Petition for review DENIED.

GEORGE
Chief Justice

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN MATEO

ANTHONY E. BLUMBERG, et al.,	No. 391223
Plaintiff,	CLASS ACTION
v.	(Filed Oct. 11, 1995)
GLENBOROUGH REALTY CORPORATION, GLENBOROUGH CORPORATION, and ROBERT BATINOVICH, et al.,	
Defendants.	

ORDER CERTIFYING SETTLEMENT CLASS, APPROVING NOTICE OF PROPOSED SETTLEMENT, AND SETTING SETTLEMENT HEARING

The Court has received the Class Action Settlement Agreement, dated as of October 9, 1995, that has been entered into by the Class Representative and the Defendants. The Court has reviewed the Agreement and its attached exhibits, and, good cause appearing,

IT IS HEREBY ORDERED AS FOLLOWS:

1. The Court, for purposes of this order, adopts the definitions set forth in paragraphs 2.1 through 2.23 of the Agreement.

The Court approves the settlement of the Action set forth in the Agreement as falling within the range of

possible approval and meriting submission to the Settlement Class for consideration, pursuant to California law and Rule 23(e) of the Federal Rules of Civil Procedure.

3. The Court hereby certifies the Settlement Class consisting of all persons who hold units of the Limited Partnerships as of the record date set forth in the Prospectus, pursuant to California Code of Civil Procedure Section 382 and Federal Rule of Civil Procedure 23, subdivisions (b)(1) and (b)(2). Excluded from the Settlement Class are Defendants, their officers and directors, members of their immediate families, entities in which any of the Defendants has a controlling interest, and the legal representatives, heirs, successors, predecessors in interest or assigns of any of the Defendants. The Court appoints Anthony E. Blumberg as representative of the Settlement Class. The Court further appoints the law firms of Chimicles, Jacobsen & Tikellis and Krislov & Associates, Ltd. as counsel for the Settlement Class. The certification of the Settlement Class, and the appointments of the Class Representative and Class Counsel, shall be binding only with respect to the settlement of the Action. In the event the Agreement is terminated or the Effective Date for any reason does not occur, the certification of the Settlement Class and appointments of the Class Representative and Class Counsel shall automatically be vacated, and the Action shall proceed as though the Settlement Class had never been certified.

4. The Court approves the Notice of Proposed Settlement and Settlement Hearing for distribution to the Settlement Class substantially in the form of Exhibit A to this order.

5. Defendants shall send by first class mail the Notice of Proposed Settlement to all Settlement Class Members on or before November 15, 1995. Defendants shall file with the Court and serve upon Class Counsel no later than 10 days prior to the Settlement Hearing an affidavit or declaration stating that the mailings have been completed in accordance with the terms of this order. The REIT shall bear the costs of mailing the Notice of Proposed Settlement to Settlement Class Members.

6. The Court finds that dissemination of the Notice of Proposed Settlement in the manner required by paragraph 5 of this order constitutes the best notice practicable under the circumstances to all Settlement Class Members, and complies fully with California law, Rule 23(e) of the Federal Rules of Civil Procedure, and the United States Constitution.

7. A Settlement Hearing will be held on December 21 1995 at 9:00 a.m. at which time the Court will determine (1) whether the settlement of the Action should be approved as fair, reasonable and adequate; (2) whether the application of Class Counsel for an award of attorneys' fees, costs, and expenses and for an incentive award to the Class Representative should be approved. The Court may adjourn or continue the Settlement Hearing without further notice to the Settlement Class.

8. Any Settlement Class Member who objects to the settlement of the Action, or the application of Class Counsel for attorneys' fees, costs, and expenses, or for an incentive award to the Class Representative, shall have a right to appear and be heard at the Settlement Hearing. Any such person must file with the Court and deliver to

Class Counsel a written notice of objection postmarked on or before December 14, 1995. The manner by which a notice of objection should be prepared, filed and delivered shall be stated in the Notice of Proposed Settlement. Only Settlement Class members who have filed and delivered valid and timely written notices of objection will be entitled to be heard at the Settlement Hearing, unless the Court otherwise so orders. Class Counsel shall provide copies of any and all such notices of objections to Counsel for Defendants at least ten days before the Settlement Hearing.

9. Class Counsel shall submit any application they wish to make for attorneys' fees, costs, and expenses and application for incentive award to the Court on or before December 1, 1995.

10. All briefs supporting or opposing the settlement shall be served and filed not less than 7 days prior to the Settlement Hearing.

11. All discovery and other proceedings in the Action are stayed until such further order of the Court, except as may be necessary to implement the settlement of the Action or comply with the terms of the Agreement. The Class Representative and the Settlement Class Members are barred from commencing or prosecuting any direct or representative action asserting any of the Settled Class Claims, unless and until the Agreement is terminated according to its terms.

12. The Court may, for good cause, extend any of the deadlines set forth in this order without further notice to the Settlement Class. Class Counsel shall, however,

notify all parties, Counsel for Defendants and any Settlement Class Member who has indicated an objection to settlement of the Action, of any extension of any deadline ordered by the Court.

13. The Settlement Class is mandatory. Settlement Class members are precluded from excluding themselves from the Final Judgment or from opting out of the Settlement Class.

Dated: October 11, 1995 /s/ Walter Harrington
California Superior
Court Judge

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN MATEO

ANTHONY E. BLUMBERG, et al., Plaintiff, v. GLENBOROUGH REALTY CORPORATION, GLENBOROUGH CORPORATION, and ROBERT BATINOVICH, et al., Defendants.	No. 391223 CLASS ACTION

NOTICE OF PROPOSED SETTLEMENT AND SETTLEMENT HEARING

TO: ALL PERSONS AND ENTITIES WHO WERE UNIT HOLDERS OF RECORD OF LIMITED PARTNERSHIP UNITS IN ANY OF THE FOLLOWING LIMITED PARTNERSHIPS AS OF OCTOBER ___, 1995:

- EQUITEC INCOME REAL ESTATE INVESTORS B;
- EQUITEC INCOME REAL ESTATE INVESTORS C:
- EQUITEC INCOME REAL ESTATE INVESTORS – EQUITY FUND 4
- EQUITEC MORTGAGE FUND IV;
- EQUITEC 79 REAL ESTATE INVESTORS;
- OUTLOOK PROPERTIES FUND IV;
- GLENBOROUGH ALL SUITE HOTELS L.P.;
- GLENBOROUGH PENSION INVESTORS.

PLEASE READ THIS NOTICE CAREFULLY. YOUR RIGHTS WILL BE AFFECTED BY THE PROCEEDINGS IN THIS LITIGATION. THIS NOTICE RELATES TO A PROPOSED SETTLEMENT OF THE LITIGATION REFERRED TO IN THE CAPTION. THE PROPOSED SETTLEMENT CONCERNS BENEFITS TO THE PARTNERSHIPS, WHICH ARE DESCRIBED MORE FULLY BELOW. IF THE COURT APPROVES THE PROPOSED SETTLEMENT, YOU MAY BE FOREVER BARRED FROM CONTESTING THE FAIRNESS, REASONABLENESS OR ADEQUACY OF THE PROPOSED SETTLEMENT OR FROM PURSUING THE SETTLED CLAIMS AGAINST THE DEFENDANTS.

1. This Notice is given pursuant to the California Code of Civil Procedure, Rule 23(e) of the Federal Rules of Civil Procedure and an order of the California Superior Court for the County of San Mateo (the "Court") dated October ___, 1995 (the "Preliminary Order"), entered in the above-entitled action (the "Action"), to notify you of the pendency of the Action, the proposed settlement of the Action, the Court's certification of the class for purposes of this settlement, of a settlement hearing (the "Settlement Hearing") and your rights with respect to the foregoing.

2. The Settlement Hearing will be held on ___ 1995, at _____9:00 a.m. in Department ___ of the San Mateo County Superior Court, at the State of California Superior Courthouse, 401 Marshall Street, Redwood City, California, 94603. The purpose of the hearing is to determine (1) whether the settlement of the Action should be approved as fair, reasonable and adequate; and (2) whether the application of the settlement class's counsel for attorneys'

fees, costs, and expenses and for an incentive award to the class representative should be approved.

3. This Notice is not intended to be, and should not be construed as, an expression of any opinion by this Court with respect to the truth of the allegations in the Action or the merits of the claims or defenses asserted. The purpose of this Notice is to advise you of the proposed settlement of the Action and your rights with regard to it. The factual statements herein are based on information provided to the Court by counsel for the parties and do not constitute findings of the Court.

BACKGROUND AND NATURE OF THE LITIGATION

4. On September 1, 1994, Glenborough Realty Corporation and Robert Batinovich filed a registration statement on Form S-4 with the Securities and Exchange Commission. The registration statement described a proposed consolidation (the "Consolidation") by merger of Glenborough Corporation and up to eight real estate partnerships (the "Limited Partnerships"), and the formation of a new corporation known as Glenborough Realty Trust Incorporated (the "REIT").

5. The eight Limited Partnerships included in the proposed Consolidation were Equitec Income Real Estate Investors B, Equitec Income Real Estate Investors C, Equitec Income Real Estate Investors – Equity Fund 4, Equitec Mortgage Investors Fund IV, Equitec 79 Real Estate Investors, Outlook Properties Fund IV, Glenborough All Suite Hotels, L.P., and Glenborough Pension Investors.

6. On September 2, 1994, Glenborough Realty Corporation and Robert Batinovich filed Pre-Effective Amendment No. 1 to the Registration Statement. Pre-Effective Amendment No. 2 to the Registration Statement was filed with the Securities and Exchange Commission on January 4, 1995.

7. On February 21, 1995, Anthony E. Blumberg ("Plaintiff") commenced the Action against Glenborough Realty Corporation, Glenborough Corporation, and Robert Batinovich ("Defendants") entitled *Blumberg v. Glenborough Realty Corporation, et al.*, Case No. 391223 (Cal. Super. Ct.). The Action was filed on behalf of a putative class comprised of unit holders of the Limited Partnerships that were the subject of the proposed Consolidation (the "Settlement Class"), and charged the Defendants with breaches of fiduciary duty and breaches of the duty of good faith and fair dealing. The Action prayed for equitable relief, preliminary and permanent injunctive relief, and compensatory damages.

8. The Action alleged that the registration statement filed on form S-4 with the Securities and Exchange Commission on September 1, 1994, together with all of its amendments, including the prospectus and associated consent solicitation materials disseminated concurrently with this Notice pursuant to the Consolidation (the "Prospectus") (collectively, the "Registration Statement"), were false and misleading, and designed to coerce the approval of the Consolidation. According to the Action, the Registration Statement and Prospectus failed adequately to disclose the terms and risks of the Consolidation, and also misrepresented the fairness of the

Consolidation to Settlement Class Members, all in breach of Defendants' fiduciary duties.

9. The Action also alleged that (1) the proposed Consolidation, if completed, would have the effect of unfairly entrenching management and depriving the Settlement Class Members of the opportunity to maximize investment returns, and (2) the terms of the Consolidation were unfair to the Settlement Class Members, based in part on the Action's allegation that the Consolidation assigned an arbitrary and excessive valuation to Glenborough Corporation, which was determined without an appraisal of its business or assets. Based upon these allegations, the Action further alleged that the owners of Glenborough Corporation would obtain an excessively high allocation of shares in the REIT under the terms of the Consolidation.

10. On June 26, 1995, Pre-Effective Amendment No. 3 to the Registration Statement was filed with the Securities and Exchange Commission. The Registration Statement, as amended, included the additional disclosures and terms requested by Class Counsel.

11. On September 1, 1995, Glenborough Realty Corporation and Robert Batinovich filed Pre-Effective Amendment No. 4 to the Registration Statement. Additional amendments to the Registration Statement may be filed in the future. In addition, on or before October 15, 1995, Glenborough Realty Corporation and Robert Batinovich intend to distribute the Prospectus to the Settlement Class Members. The additional amendments to the Registration Statement, and the Prospectus, included

and will include the additional disclosures and terms requested by Class Counsel.

12. A written Class Action Settlement Agreement (the "Agreement") dated as of October ___, 1995, was entered into by the Class Representative and the Defendants.

PLAINTIFF'S INVESTIGATION, DISCOVERY AND THE PARTIES' DECISION TO SETTLE

13. Class Counsel have made a thorough investigation of the Consolidation and the facts and circumstances surrounding the allegations made in the Action. They have reviewed and analyzed the Registration Statement and Prospectus, publicly available information, and thousands of pages of documents produced by Defendants. They have also performed extensive analyses of the relative cash flows of Glenborough Corporation and the Limited Partnerships, investigated comparable transactions, consulted with an expert witness, and investigated the law applicable to their claims and to the defenses raised by Defendants.

14. Class Counsel have concluded that it is in the best interests of the Class Representative and Settlement Class Members that the Action be settled on the terms and conditions set forth in the Agreement. Based on the terms of the proposed Consolidation, as disclosed in the Registration Statement, Class Counsel believe that the Agreement is fair, reasonable, and adequate, and that the Consolidation is within the range of reasonableness for the Settlement Class Members. Class Counsel have

reached these conclusions after considering the disclosures made in the Registration Statement and Prospectus (including the additional and improved disclosures set out in paragraph 19), all of the terms of the Consolidation (including the additional restrictions on stock sales and options set out in paragraph 20), the financial assumptions underlying the Consolidation, the fact that Defendants decided not to change the Level I allocation of stock in the REIT notwithstanding a substantial increase in Glenborough Corporation's contribution to cash flow from the amount set forth in Pre-Effective Amendment No. 2, the facts and circumstances surrounding the allegations made in the Action, the risks and uncertainties of continued litigation, the expense that would be necessary to prosecute the Action through trial and through any appeals that might be taken, and the likelihood of success at trial.

15. Defendants have indicated their intent vigorously to contest each and every claim underlying the Action. Defendants have consistently maintained that they acted in accordance with governing laws at all times, that the Consolidation as originally proposed was fair to the Limited Partnerships and all limited partners, and that the Registration Statement fairly and adequately described and disclosed the terms of the Consolidation.

16. Defendants have concluded that it is in their best interests that the Action be settled on the terms and conditions set forth in the Agreement. Defendants reached that conclusion after considering the risks and uncertainties of continued litigation, the substantial benefits to the Defendants of a final resolution of the Action, the effort and expense that would be necessary to defend

the Action through discovery, trial, and any appeals that might be taken, the benefits of disposing of protracted complex litigation, and the desire of Defendants to go forward with the Consolidation unhampered by the distractions of continued litigation.

SETTLEMENT OF THE ACTION

17. The following description of the Agreement is only a summary. Reference may be made to the text of the Agreement, on file with the Court, for a full statement of its provisions.

Order Certifying Class for Settlement Purposes Only

18. On October ___, 1995, the Court certified the Settlement Class for purposes of the proposed settlement of the Action only. The Settlement Class is composed of all persons who hold units of the Limited Partnerships as of the record date set forth in the Prospectus. Excluded from the Settlement Class are the Defendants, their officers and directors, members of their immediate families, entities in which any of the Defendants has a controlling interest, and the legal representatives, heirs, successors, predecessors in interest or assigns of the Defendants. The Court also appointed Anthony E. Blumberg as representative for the class ("Class Representative") and designated the law firms of Chimicles, Jacobsen & Tikellis and Krislov & Associates, Ltd. as counsel for the Settlement Class ("Class Counsel").

Terms of Settlement

19. At Class Counsel's request, the Registration Statement and Prospectus to be distributed to Settlement Class Members contain certain additional disclosures concerning the proposed Consolidation. The additional disclosures are to the effect that:

(i) The relatively small size of the REIT, in terms of equity capitalization, could tend to depress the market value of the shares by comparison to real estate investment trusts with larger equity capitalization. (Pre-Effective Amendment No. 4, page 28.)

(ii) In January 1994, Glenborough Corporation acquired the right to manage eight limited partnerships previously managed by Rancon Corporation. Glenborough Corporation's total purchase price for Rancon's management interests was $6,994,250. In addition, Glenborough Corporation agreed to pay Rancon $1,830,000 to acquire real estate from Rancon Current Yield 12+ and $270,000 to acquire real estate from Rancon and Rancon Palomar View Estates L.P. In addition, Glenborough Corporation incurred $508,338 in fees and costs associated with these transactions. Approximately $3.9 million of these obligations will be assumed by the REIT. (Pre-Effective Amendment No. 4, pages 322-23.)

(iii) It is possible that Glenborough Corporation's management income could decline in the event one or more of the Rancon-related partnerships were to liquidate or become insolvent. (Pre-Effective Amendment No. 4, page 33.) In addition, the most recent financial audit of Rancon Development Fund VI states that the financial statements were prepared "assuming that . . . Fund

VI . . . will continue as a going concern." (Pre-Effective Amendment No. 4, page 322.)

(iv) There is no separate appraisal of Glenborough Corporation's business or assets. In the event the market value of the REIT's shares declines after the Consolidation, the potential adverse impact of the possible overvaluation or decline in value of Glenborough Corporation could be greater as a result of Glenborough Corporation's debt assumed by the REIT than if Glenborough Corporation were debt-free. In addition, the valuation of Glenborough Corporation for purposes of the Consolidation may be higher than if Glenborough Corporation were to sell its management business in a transaction with an unaffiliated third party. (Pre-Effective Amendment No. 4, page 30.)

20. At Class Counsel's request, the Registration Statement and Prospectus to be distributed to Settlement Class Members contain certain restrictions on the sale of stock and the granting of stock options following the Consolidation, which are intended to enhance the post-Consolidation value of the shares. These restrictions are to the effect that:

(i) Robert Batinovich and the attributed owners have agreed not to sell any of their shares of common stock for two years after the completion of the Consolidation. (Pre-Effective Amendment No. 4, page 355.)

(ii) No options will be granted under the incentive plan until 90 days after the consummation of the Consolidation. (Pre-Effective Amendment No. 4, page 213.)

(iii) No options will be granted by the REIT for an exercise price of less than $15 per share of common stock prior to the expiration of one year after the consummation of the Consolidation. (Pre-Effective Amendment No. 4, page 213.)

MANDATORY NATURE OF SETTLEMENT

21. The Settlement Class is mandatory. Settlement Class Members are precluded from excluding themselves from the Final Judgment, as described below, and may not opt out of the Settlement Class.

FINAL JUDGMENT, RELEASES AND DISMISSALS

22. The proposed settlement is conditioned on, among other things, entry by the Court of a Final Judgment and Order approving the settlement and the terms of the Agreement as fair, reasonable and adequate to the members of the Settlement Class. Under the terms of the Final Judgment and Order that will be proposed, the Court will permanently bar and enjoin the Class Representative and all Settlement Class Members from instituting or prosecuting, in any capacity, any action or proceeding that involves or asserts any of the Settled Claims, as defined in paragraph 24, below.

23. The Final Judgment will dismiss the Action, and all claims in it, on the merits and with prejudice as to the Class Representative and the Settlement Class. It will provide that neither the Final Judgment, nor any of its terms or provisions, nor any of the negotiations or proceedings connected with it, shall be referred to, offered as

evidence, or received in evidence in any pending or future civil, criminal, or administrative action or proceeding, except in a proceeding to enforce the Final Judgment, or to defend against the assertion of the Settled Claims, or as otherwise required by law.

24. The Final Judgment will also provide that the Settlement Class members shall be deemed to have released and forever discharged the Defendants, and each of their respective present and former employees, officers, directors, partners, participating principals, agents, attorneys, legal representatives, spouses, heirs, assigns, all other persons related to or affiliated with any of them, and all other persons from all claims, rights, demands, causes of action, liabilities, and suits of any kind whatsoever, whether known or unknown, that have been, could have been, or in the future might be asserted based upon, arising out of, or in any way relating to: (1) the Consolidation; (2) the acquisition by any Settlement Class Member of any shares of the REIT pursuant to the Consolidation; (3) any act, failure to act, omission, misrepresentation, fact, event, transaction, occurrence, or other matter alleged, or which could have been alleged, in the Action; (4) any omission or misrepresentation in the Prospectus or Registration Statement; or (5) the subject matter of the Action (the "Settled Claims").

ATTORNEYS' FEES AND EXPENSES

25. Class Counsel have indicated that they will apply to the Court for an award of attorneys' fees, costs, and expenses against the REIT of up to $850,000, based upon the benefit conferred on Settlement Class Members

by the Action. Class Counsel have also indicated that they will apply to the Court for an incentive award, payable to the Class Representative by the REIT, of $5,000.

26. Defendants, in recognition of the benefit conferred by the Action, have agreed not to oppose a request by Class Counsel for attorneys' fees, costs, and expenses, and for an incentive award to the Class Representative made in compliance with the Agreement. Defendants have further agreed that the REIT will pay any award of attorneys' fees, costs, and expenses that may be made by the Court, up to the amount of $850,000. The REIT will also pay any incentive award to Class Representative that may be made by the Court, up to the amount of $5,000.

CONDITIONS OF SETTLEMENT

27. The settlement of the Action is contingent upon, among other things, the occurrence of a number of events, including: (i) entry by the Court of the Final Judgment; (ii) expiration of the time to appeal from the Final Judgment; (iii) if any appeal is taken from the Final Judgment, either dismissal of the appeal or affirmance of the Final Judgment; (iv) if a ruling or decision is entered by an appellate court with respect to the Final Judgment, expiration of the time to petition for a writ of certiorari with respect to the ruling or decision; (v) if a petition for a writ of certiorari with respect to a ruling or decision by an appellate court with respect to the Final Judgment is filed, denial or dismissal of the petition or if the petition is granted, affirmance of the Final Judgment; (vi) the complete consummation of the Consolidation on the

terms and subject to the conditions set forth in the Prospectus and Registration Statement.

28. These conditions may be subject to waiver. Nonetheless, if for any reason, any of these conditions are not met, the Settlement Agreement may be terminated, and if terminated, will have no further force or effect and the Action will proceed as though the Agreement had never been signed.

THE RIGHT TO BE HEARD AT THE SETTLEMENT HEARING

29. Any Settlement Class member who objects to any aspect of the settlement of the Action or Class Counsel's application for fees, costs and expenses or the application for the incentive award to the Class Representative has a right to appear and be heard at the Settlement Hearing.

30. However, unless the Court in its discretion otherwise directs, members of the Settlement Class, and all others (excluding the parties), shall not be heard or be entitled to oppose the approval of the terms and conditions of the settlement or (if approved) the judgment to be entered thereon, or the allowance of fees and expenses to Class Counsel, or the allowance of an incentive award to the Class Representative, and no papers, briefs, pleadings or other documents submitted by any member of the Settlement Class, or any other person (excluding the parties) shall be received and considered, except by order of the Court for good cause shown, unless, no later than _____, 1995, 15 days prior to the Settlement Hearing,

such person has served and filed the following documents in the manner – provided below:

(a) A Notice of Intention to Appear; and

(b) A detailed statement of such person's specific objections to any matter before the Court, the grounds for such objections and any reasons why such person desires to appear and to be heard, and enclosing all documents and writings that such person desires the Court to consider.

31. Such documents shall be filed with the Court at the address noted in paragraph 2 above and served by first class mail upon the following counsel:

Clinton A. Krislov, Esq.
Krislov & Associates, Ltd.
222 North La Salle Street, Suite 810
Chicago, IL 60601-1086

-or-

James R. Malone
Chimicles, Jacobsen & Tikellis
361 West Lancaster Avenue
Haverford, PA 19041
Class Counsel

32. Any person who fails to object in the manner provided herein shall be deemed to have waived his, her, or its objections and shall forever be barred from making any such objections in this Action or in any other related action or proceeding.

NOTICE TO PERSONS OR ENTITIES HOLDING OWNERSHIP ON BEHALF OF OTHERS

33. Brokerage firms, banks or other persons or entities who are current holders for the benefit of others of limited partnership units in the Limited Partnerships are directed to send this notice promptly to all such beneficial owners. In the alternative, record holders may forward the names and addresses of the Settlement Class members and beneficial owners to Defendants, who in turn will send this Notice to such persons or entities.

SCOPE OF THIS NOTICE AND FURTHER INFORMATION

34. This Notice does not purport to be a complete description of the Action, the Preliminary order, the Settlement Agreement or the other matters described herein. For more complete information concerning the Action and the proposed settlement, you may inspect the pleadings, the Agreement and other papers and documents filed with the Court in connection with the Action, during normal business hours, at the office of the Clerk of the California State Superior Court, 401 Marshall Street, Redwood City, California 94603.

35. Questions or communications concerning this Settlement may be directed to Class Counsel. Class Counsel may be contacted as follows: Clinton A. Krislov, Esq., Krislov & Associates, Ltd. 222 North La Salle Street, Suite 810, Chicago, IL 60601-1086, (312) 606-0500 or James R. Malone, Esq., Chimicles, Jacobsen & Tikellis, 361 West

Lancaster Avenue, Haverford, PA 19041, (610) 642-8500. Please do not call the Court.

Clerk of the California Superior Court
San Mateo County

SUPERIOR AND MUNICIPAL COURTS OF
THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN MATEO

ANTHONY BLUMBERG,
Plaintiff,
VS.
GLENBOROUGH REALTY,
Defendant.
_____/

No. 391223

DECISION

(Filed Jun. 4, 1996)

Submitted: Heard 1/17/96; resubmitted 3/7/96, upon filing of the last of Supplemental Points and Authorities Re *Matsushita Electrical Industrial vs. Epstein*, U. S. Supreme Court 2/27/96 Decision.

DECISION

1. Plaintiff's Motion for Final Approval of Class Action Settlement is granted, the Court finding that the settlement is fundamentally fair, adequate and reasonable to the respective parties to the settlement.

This is an action filed by Plaintiffs to challenge the consolidation or "roll-up" of eight real estate limited partnerships, into a publicly-traded Real Estate Investment Trust, (the Glenborough Realty Trust). The terms of the proposed roll-up are contained in an S-4 registration statement filed with the SEC on September 1, 1994, and twice amended, September 2, 1994, and January 4, 1995. Defendants Robert, Batinovich and Glenborough Realty are the general partners of the partnerships.

The action was brought by Plaintiffs on behalf of the class of 13,000 limited partnerships of the various partnerships involved in this particular roll-up and was challenged on a number of bases.

Under the terms of the roll-up, limited partners of the partnership are to surrender their interest in the partnerships for shares of the common stock of the REIT, and Defendants Robert, Batinovich and Glenborough Realty will also receive shares in exchange for contributing the Glenborough Corporation, and assorted other businesses and interests, including the interests as general partner in the various limited partnerships. The allocation of shares, it was proposed, should be 79.76% to the limited partners, and 20.24% to the general partners.

The Plaintiff and Glenborough engaged in negotiations, and certain modifications were made, reflected in the post-effective Amendment No. 1 to form S4, filed with Security Exchange Commission on October 26, 1995, by requiring additional disclosures and imposing certain restrictions on the sale of the general partner's stock for a period of two years and also imposing certain restrictions on management incentive options, and the exercise of such options.

Objections to the proposed settlement were filed by class members Barnett, Gold, Chaney, Mitchell and Buickerood on various grounds and raising a number of objections, both to the "roll-up" itself as well as to the attorney's fees sought by Plaintiffs for their efforts in renegotiating the terms of the roll-up.

The matter came before the Federal District Court in January, 1996, where the objectors' request for an injunction restraining the implementation of the roll-up was denied.

After the submission of the matter in January, the U. S. Supreme Court decided the Matsushita case, cited above, which case in essence, held that the State Courts do have the power to approve such settlements even though the effect of such approval would be to bar further litigation by the members of the class, not opting Out, under Federal Law, thereby reversing a contrary ruling by the 9th Circuit Court of Appeal.

In the final analysis, the objectors are taking issue with the equity allocation as between the limited partners and the general partners. In the respective memoranda and briefs submitted, and during oral argument, it is very clear that it is not an easy task to value the respective interests of the limited vs. general partners. The limited partners, classically, have invested in a highly illiquid partnership, with the hope of profit and a risk of loss, but with the advantages of limited liability as limited partners, and income tax benefits. The general partners, on the other hand, have the benefit of management fees but are also generally liable for the partnership debts. The Plaintiffs have demonstrated in their support of their request for approval, that their approach of cash-flow valuation, rather than relative asset valuation, is economically more realistic and is the one that is generally adopted in similar situations.

Accordingly, and considering the benefits conferred on the settling class members by the settlement, and the

risks faced by the settlement class members of establishing liability, causation and damages, and the likely probable duration and further expense of the likely burdensome and protracted litigation in the absence of settlement, the Court does approve the settlement, finds it was entered in good faith, and makes its judgment to that effect.

2. Attorney's fees. The Court has examined the request for attorney's fees submitted by counsel for the Plaintiffs, and finds that the total of attorney's fees sought by counsel for the Plaintiffs, together with costs, is fair and reasonable and should be awarded in the approximate sum of $850,000.00, plus $5,000.00 in incentive fees.

DATED: JUN – 4 1996

/s/ Walter H. Harrington
Walter H. Harrington, Jr., Judge

No. 98-303

Supreme Court, U.S.
FILED
SEP 18 1998
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1997

DONALD A. BARNETT, SHEILA GOLD, RONDA CHANEY, LON CHANEY, JR., WILLIAM P. MITCHELL and ROBERT Q. BUICKEROOD,

Petitioners-Intervenors Below,

vs.

GLENBOROUGH REALTY CORPORATION, GLENBOROUGH CORPORATION, and ROBERT BATINOVICH, et al.,

Respondents-Defendants,

and

ANTHONY BLUMBERG,

Respondent-Original Plaintiff Class Representative.

On Petition For *Writ Of Certiorari*
To The California Court Of Appeals
For The First Appellate District, Division Four

RESPONDENT ANTHONY BLUMBERG'S OPPOSITION TO BARNETT PETITION FOR CERTIORARI

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23 pp

QUESTION PRESENTED

In litigation over the consolidation "rollup" of a series of limited partnerships into a single corporate entity which has been certified as a mandatory (i.e., non-opt-out) class under State law concepts mirroring federal rule 23(b)(1)(A), because separate inconsistent adjudications (e.g., of the legality of the transaction and the allocation of the single class of resulting shares) would establish incompatible standards of conduct for the parties opposing the class, and where the transaction, as improved by the class settlement, has been submitted to vote by all class members and received the affirmative approval by a majority of units of each partnership in accordance with the governing partnership agreements, whether due process requires that absent class members nonetheless must still be granted an opt-out opportunity because the original complaint contained a request for money damages as an alternative remedy, even though they are not primary to the case, and flow solely from the equitable allocation of units/shares at the heart of the controversy.

PARTIES TO THE PROCEEDINGS

The petition accurately lists the parties to the proceeding.

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I.

STATEMENT OF THE CASE

Petitioners ask the court to review the California State courts' approval of a settlement of class litigation originally brought by limited partner/class representative Anthony Blumberg challenging the terms of a proposed "roll-up" consolidation of eight illiquid California limited partnerships into a single Real Estate Investment Trust (commonly known as a "REIT") whose shares thereby became listed and readily tradable on the New York Stock Exchange (symbol "GLB").

The California Superior court certified the settlement class (October 11, 1995) on a mandatory (i.e., non-optout) basis, under State provisions mirroring FRCP 23(b)(1)(A). Pursuant to each partnership's governing agreement, the transaction, as improved by terms negotiated by class counsel, was submitted (October 26, 1995) to the vote of all unitholders and received the requisite approval by a majority of the units of each partnership as required by the Partnership Agreements. App. 6. Petitioners, certain limited partner objectors below, intervened in the trial court and actively asserted their objections to the settlement, which the court received on hearing and briefs, considered, and rejected, ultimately approving the settlement in toto. App. 49.[1]

In a lengthy, but unpublished decision, the California Court of Appeal affirmed. *Barnett v. Glenborough Realty*

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[1] All "App." citations are to the Appendix to the Barnett petition for Certiorari.

Corp. (Cal. App. 1st Dist., Div. 4, February 17, 1998) App. 1.

As detailed herein, the issue requested by petitioners (i.e., whether due process permits certification of a mandatory/nonoptout class in a primarily money damages case) is not presented in this case at all. Rather, the case has always been entirely about the legality and fair allocation of units in a corporate structuring transaction, purely equitable issues that have traditionally been, and can only be, resolved on a unitary nonoptout basis, to avoid conflicting results in different forums, and fully satisfy all due process concerns that dissenting partners' interests be vigorously asserted and considered.

1. Petitioners' Mischaracterization Of The Case.

In order to attract the Court's attention, Petitioners mischaracterize the case and omit critical facts in a number of critical respects:

(1) mischaracterize the nature of the case as a money damages, rather than primarily equitable, case concerning the allocation of interests among the parties to the transaction;

(2) omit mentioning that the transaction, as improved by the settlement, obtained the requisite affirmative approval by a majority of the units in each partnership;

(3) ignore that the transaction as finalized and voted on reflected substantial improvements that have been reflected in the post-transaction market;

(4) ignore the fact that petitioners' due process rights were fully met by affording their active participation in the court below, which considered but rejected their objections to the settlement.

(5) Omit mention that petitioners never requested an optout right for themselves in the trial court.

(i) Nature Of The Case Is Primarily The Equitable Allocation Of A Single Class Of The Ownership Units Of A Single Entity; Not Primarily Money Damages. Petitioners first misportray the case as a primarily money damage class action that was inappropriately treated as equitable, settled by a non-cash settlement that was obtained by offering big fees.[2] While such cases may exist elsewhere, the courts below all recognized that this case was always primarily an equitable action, to determine the legitimacy of a "rollup" consolidation transaction, the allocation of shares of the resulting entity and the post-transaction protections to the value of those shares.

As such, the case was always a "(b)(1)" type class, for which opt outs are not appropriate. Since the case was wholly and always a dispute over the legality (declaratory relief) and the fair allocation of interests in a corporate structuring transaction, the only "money damages"

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[2] In fact, the appellate court confirmed that "the record shows that there was no discussion of fees or incentives until after the parties reached agreement on the substance of the settlement." App. 17.

involved were secondary the incidental result of equitable or declaratory relief; i.e., the value of whatever excessive allocation of shares were ultimately received by the general partner defendants in the transaction. App. 21.

There is absolutely no basis, in or outside the record, for the petitioners' assertion that the case was *primarily* a money damage case, Petition at 22, nor the Petitioners' unsupported and unspecified assertions that the settlement foreclosed the class from "money damages" that petitioners label as "substantial" or how they had an "estimated value of between $10 and $20 million", without disclosing the nature of those damages. Petition at 8.[3]

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[3] The petitioners never identify what they believe the nature of these substantial money damages are, and with good reason. Referring to the damages specified in our original complaint, the compensation was for the value of the units that would be excessively allocated to the general partner in the transaction. Thus the money damages were actually secondary, potential future damages sought to be avoided by an equitable allocation of shares in the resulting entity.

As distinct from "purchase" cases, asserting seeking recovery of overpayment or defrauded costs for buying units, this case never had such a component. The partnerships had been formed years before, promoted and sold by other companies. The defendant general partner here had acquired its management/general partner interest years later, by purchase or out of bankruptcies. App. 2. Thus, no securities fraud-type purchaser "money damage" claims were ever assertable against these defendants. Also, there was no assertion by either plaintiffs or objectors that the defendants had committed improprieties in their operation of the partnerships. Thus, the only "money damages" claim in the case at all, was the incidental value of excessive units that might have otherwise been allocated to the general partner in the transaction. See: Manual for Complex Litigation 3d, § 30.13 at 217 n.681.

The Primary Issue Is Equitable: The Apportionment Of Equity Interests Among The Partners. In all such reorganizations the primary issue issue is equitable – how the resulting entity REIT's shares are to be apportioned between the General Partner, on the one hand, and the aggregate Limited Partner interests, on the other.[4]

As readily understood by the courts below, it is the Level I allocation which is the primary battleground, because it is there that the interests of the general partner and the limited partners in the proposed transaction conflict, over how the equity "pie" is divided.

(ii) The Settlement Was Voted On And Affirmatively Approved By A Majority Of The Units In Each Partnership, In Accordance With The Governing Partnership Agreements. The Petitioners also fail to acknowledge that each partnership's agreement dictated the

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[4] Allocations actually occur on three levels: First, the "Level-One" allocation of units between the management company and the limited partnerships in the aggregate; second, the "Level-Two" allocation of the aggregate partnerships' units among the eight limited partnerships; third, the "Level-Three" allocation of each limited partnership's units among its partners. As originally proposed by the management company/general partner, the Level I allocation was to be made on the basis of the relative cash-flow contributed by the limited partnerships' real estate of their properties and the management companies' cash flow from its management contracts. The Level II allocation among the limited partnerships was made based upon the relative appraised valuation of each partnerships' underlying assets. The Level III allocation, within each partnership, was done on the basis of how a liquidation of units would be distributed among the partners under the governing partnership agreements.

manner in which such reorganizations are accomplished, omits mention that the transaction (whose terms were improved and better disclosed as a result of the class settlement) was actually submitted to a vote of all class members/limited partners, or that they affirmatively approved the merger, by the requisite majority vote of each partnership's units, in full compliance with each Partnership's government Agreement. App. 6. This starkly contrasts with the usual settlement, in which class members' views are generally only inferable from their inaction.

(iii) The Substantial Benefits From The Settlement. The petition also omits mention of the substantial benefits produced by the litigation and settlement. As the courts below recognized, the numerous improvements that were made to the transaction as it progressed to its final form – the improved proxy disclosures, the freezing of the units' allocations between the General and the "limiteds" in spite of the general partners' contribution of substantial additional assets to the transaction, (increasing management's contributed cashflow by some 50% plus the improved and extended antidilution and post-rollup market price protections – all resulted from class counsel's efforts. The appellate court explicitly recognized this factor, App. 14-15, and rejected the Petitioners' misrepresentation, repeated in their petition at 19, that the settlement added nothing to the final transaction presented to the class. The petition intentionally ignores the fact that class counsel had succeeded in having all the equitable improvements incorporated into the proposed transaction as it developed, and that the final "deal" that emerged reflected Class counsel's efforts achieved prior

to the formal settlement agreement that recognized these benefits. App. 14-15.

As recognized by the courts below, these benefits were substantial: (i) improving the disclosures in the *prospectus*, (ii) adding and extending the post-rollup market price protections, and (iii) preventing any increase in management's share of the Level I allocation of units even after it was demonstrated that management would otherwise have been entitled to more, reflecting the the general partners' contribution of substantial *additional* cash-flow from an additional management contract (the "Rancon Management contract") without increasing the management company's share of the resulting entity to reflect the increased cashflow. App. 15.

Moreover, on a purely cash basis, the transaction's benefits to these limited partners, from where they were when the transaction was proposed, is undeniable and superior to the liquidation and sale that the Petitioners/objectors had demanded below.[5] Thus, the benefits of the

---

[5] Like most limited partnerships sold during the 1970's and 80's, none of the partnerships had performed as hoped. Only two of them had ever actually returned their limited partners' entire original investment over the whole period of the partnerships' lives. App. 2. Since the units of such partnerships traded only in a highly liquid unregulated secondary market, partners who wished to "cash out" could generally find buyers for their units only at approximately 50% of the units' underlying asset value.

Viewed in relationship to the apportioned REIT units, each partner's interest in his $15.00 per-unit underlying value was thus salable prior to the transaction for only approximately $7.50.

transaction have been substantial to the limited partners class members, who previously could liquidate their units at only 50% of underlying value, App. 2, but now hold shares easily liquidated at nearly 200% of underlying values, or just sit, comfortably holding the units and continuing to receive quarterly distributions which have themselves increased since the rollup.

Thus, the settlement was fair and reasonable, and produced a transaction that was approved not only by the Court, but also by the class members' affirmative vote, after a disclosure which was itself improved by the settling plaintiffs' efforts. And, it has resulted in cash benefits vastly greater than the liquidation that petitioners sought below. Accordingly, the transaction was not only fair, reasonable and approvable. It was also demonstrably superior to the liquidation which the objectors urged below.

The results produced by the conversion have been superior. After the transaction, although the REIT units (NYSE trading symbol: GLB) temporarily dipped to as low as $12.50 per unit for a short time (reflecting normal pent-up sale desires by longtime holders, the units quickly rebounded to their $15.00 Exchange Value, and thereafter rose steadily, such that GLB shares have recently been actively trading (and readily saiable) at $30.00 per share, only recently dropping to the mid-twenties in the recent market corrections. In contrast, the petitioners, as objectors below, favored the forced sale of the real estate and liquidation of the partnerships in individual real estate sales which would have resulted in discounts of 5-30% from appraised values (A.A. 1494) and/or reduced by ongoing operational costs of operating the partnerships during the sale process period (A.A. 2349) netting no more than $15.00 per unit and spread over the number of years during which sales efforts would be conducted.

(iv) The Courts Below Afforded The Petitioners Full Due Process Rights Which They Aggressively Asserted. As is apparent from the trial and appellate court decisions below App. 49, and App. 1, these petitioners intervened in the case, and fully litigated the issues relating to fairness and the criteria for approval. No assertion was ever made that California was an inconvenient nor inappropriate forum to resolve these issues. Thus petitioners' due process rights were fully and actively afforded and asserted.

(v) These Petitioners Never Requested To Be Excluded At The Trial Court. Petitioners' Statement of the Case at 11, artfully glosses over the fact that these petitioners never sought exclusion in the trial court. Rather, they challenged solely the fairness of the settlement. The other objectors who sought exclusion never appealed. Accordingly, petitioners' standing to assert this claim is questionable at best.

II.

REASONS FOR DENYING THE WRIT

A. Mandatory Class Certification Treatment was correctly accepted as the only appropriate method of adjudication of the equitable allocation of units in a single entity.

The Mandatory Non-Opt-Out Class In Context. Totally ignored by the Petitioners, the allocation of shares of a corporate entity can be determined in *only* one way for all partners. The units in a single corporate entity cannot be resolved differently for different

people. This is precisely what Federal[6] Rule 23(b)(1)[7] and (b)(2)[8] certifications were made for and why it is not remarkable that they are, and have always been acknowledged as appropriately non-opt-out cases.

Differently oriented, Rule 23(b)(3) money damage *recovery* cases (previously referred to as "spurious" class actions)[9] are, in substance, entirely separate claims that are permitted to be aggregated, certified as class actions for the management benefits and the economies of scale realized by grouping a bunch of money-recovery cases

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[6] The Federal Rules and case law interpretations are a persuasive source of authority that California Courts may rely upon. *See Vasquez v. Superior Court*, 4 Cal. 3d 800, 821 (1971); *La Sala v. American Savings & Loan Association*, 5 Cal. 3d 864 (1976).

[7] Federal Rule 23(b)(1) pertains where:

> "the prosecution of separate actions by or against individual members of the class would create a risk of (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interest . . . ".

[8] Rule 23(b)(2) applies where "the party opposing a class has acted or refused to act as grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declarative relief with respect to the class as a whole . . . ".

[9] For a discussion of the pre-1966 three-category distinction between "true", "hybrid" and "spurious" class suits, see Yeazell, From Medieval Group Litigation to the Modern Class Action (Yale Univ. Press, New Haven, 1987) at 230-2.

together, that often might not otherwise be viable, individually. The recovery for one plaintiff does not conceptually conflict with a differently calculated recovery for another, even if they are against the same defendant. So, (b)(3) cases must generally retain the opt-out privilege for a plaintiff who nonetheless wishes to press his/her own claim, on his or her own. See *Phillips Petroleum v. Shutts*, 472 U.S. 797, 811 (1985).

In contrast, cases are certified under Rule 23(b)(1) for resolution of claims that must be ultimately resolved in one way for all class members. These are "true" or "hybrid" class actions, akin to joinder and interpleader actions in which an opt-out right would create a veto power in any party to thwart the rule's purpose of ascertaining or adjudicating all of the interests in a finite res. The allocation herein of a single class of shares of the post-transaction REIT cannot be issued in conflicting quantities. So, as long as all class members' due process rights to be heard are protected, as they certainly were herein, no further right of opt-out or exclusion is appropriate or required.

B. The Petitioners' Claimed Conflict On This Issue Does Not Exist.

Petitioners' claim that a conflict exists on this issue is demonstrably false, based on a disingenuous mischaracterization of four cases. The first two, *Brown v Ticor*, 982 F.2d 386 (9th Cir. 1992), *cert. granted*, 510 U.S. 810 (1992), then *dismissed*, 511 U.S. 117 (1994); and *Bell v. American Title Insurance Company*, 226 Cal.App.3d 1589 (1991) (*Bell*), were consumer actions initiated primarily for money

damages to recover past, already-suffered, overcharges for title insurance, that were settled by mandatory classes, due to their settlements having substantial prospective equitable relief governing on the defendants' future sales activities. *Ticor* overruled the application of mandatory treatment; while *Bell* found it was within the trial court's discretion to find the case primarily equitable. *Adams v. Robertson*, 518 U.S. 810 (1996), deals with different insurance sales, but otherwise just another case of an action brought over past-suffered overcharges, a (b)(3) type of case, that was settled by a mandatory class by reason of the inclusion of equitable prospective relief.

But, regardless of whether it was appropriate to settle those past-damages money purchase cases by a mandatory class by including prospective equitable relief in the claim or settlement, there is no such conflict in a case like this one, that was always brought and settled as an inherently mandatory and equitable challenge to a transaction that had not yet occurred, and from which the only money damages were the potentially excessive incidental value of the units to be allocated by equitable or declaratory relief.

Accordingly, petitioners' last-cited case, *Grimes v. Vitalink Communications Corp.*, 17 F.3d 1553 (3d Cir.), *cert. denied*, 115 S. Ct. 480 (1994), is the only relevant one they cite, and it presents no conflict. There, the Third Circuit approved of a Delaware court's adjudication of corporate restructuring issues affecting all absent class member shareholders of a Delaware corporation. The concept is not remarkable. In *Hynson v. Drummond Coal Co.*, 601 A.2d 570 (Del. Ch. 1991), the Delaware Court of Chancery concluded that it could exercise jurisdiction over absent

members of a plaintiff class who had not been provided an opportunity to opt-out of an action for breach of fiduciary duties, based solely on the fact that they owned stock in a Delaware Corporation. 601 A.2d at 575-79.

Similarly, the California courts had sufficient minimum contacts to the nominal defendant California limited partnerships to support that state's courts deciding these issues for all partners.[10] Each class member voluntarily acquired an interest in a California limited partnership, with the reasonable expectation that their rights relating to their partnership interest might be resolved in a legal proceeding in that State.

Akin to interpleader, in which the ownership units of a single *res* or entity can be allocated in only one way,[11] it was absolutely necessary *to* certify the class herein as a non-opt-out one within the categories described by Federal Rules of Civil Procedure, Rule 23(b)(1) and (b)(2), and not just for settlement purposes, either, because the dispute over how the REIT's single class of shares would be issued could be resolved only one way by a declaration of the allocation of the REIT's single class of shares among all unit holders.

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[10] See *Phillips Petroleum v. Shutts*, 472 U.S. 797 (1985). While the newly incorporated REIT was to be a Maryland entity, the State courts of California have overwhelmingly primary contacts to determine the right of partners in California-organized limited partnerships.

[11] *See United States Trust Co. of N.Y. v. Ulpert*, 163 FRD 409, 421 (SDNY 1995), rejecting assertion of opt-out rights in litigation over allocation of unit trust proceeds.

Thus, this case is *precisely* the context in which (b)(1) classes [which must be resolved in one fashion] and (b)(2) classes [injunctive relief against wrongs that have not yet occurred] are appropriate, as distinct from (b)(3) classes, in which each member has a separate action for money damages that a common defendant has caused.[12]

While injunctive actions certified under analogs to federal rule 23(b)(2) *permit* the creation of a non-opt-out class, Rule 23(b)(1) probably *requires* it, because this rule's whole *purpose*[13] is to provide a single vehicle for dealing

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[12] In contrast, Rule 23(b)(3) permits the use of the class vehicle where "questions of law or fact common to the members of the class predominate over any questions affecting only individual members". Thus, where the question is just money damages from a single defendant, Rule 23(b)(3) provides a vehicle to save the courts and the parties the cost of multiple litigations and requires the courts to afford the exercise of opt-outs because there is no reason to preclude each party who actually chooses to separately pursue his money damages claim from doing so.

[13] The differences between the sections arise out of the federal rules Committee's efforts to clarify the previous difficulty in handling what had been previously referred to as "true" class actions which (like this one) adjudicate joint interests in a common entity that cannot be simultaneously allocated in two different ways (like here) versus "hybrid" class actions (in which the interests are several, but which should all be treated the same) and the difficultly named "spurious" class actions which, as merely the permissive joinder/aggregation of entirely several claims, to render them economically feasible to pursue, cannot justify precluding an independent minded plaintiff to pursue his own claim, on his own. *See, e.g., Harkins*, Federal Rule 23 – The Early Years, 39 Arizona L. Rev. 705, 707 (1997).

with situations like this, where the allocation *must be made* in *one way* for *all class members.*

C. Petitioners Do Not Dispute That The Court's Analysis Of The Settlement Was Full And Rigorous In Satisfying Petitioners' Due Process Rights.

Petitioners do not dispute that all necessary evaluative criteria were studiously applied by the trial court and the appellate court below, including the detailed consideration of all of petitioners' objections presented to the court.

Both the trial court (App. 51) and the Appellate Court below (App. 7-17), at *Barnett,* Slip Op. 5-13, extensively analyzed the settlement, reviewed the approval process in detail, concluded that the certification under Rule 23(b)(1) and (b)(2) were appropriate, determined that the settlement appeared substantively fair, then proceeded to evaluate the procedural due process and concluded that the settlement was substantively fair, appropriately negotiated and should be approved. The court's opinions clearly show that the petitioners were given every opportunity to assert their objections, and that they aggressively did so. Due process requires no more than that.

III.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

DONALD A. BARNETT, SHEILA GOLD, RONDA CHANEY, LON CHANEY, JR., WILLIAM MITCHELL AND ROBERT Q. BUICKEROOD,

Petitioners,

vs.

GLENBOROUGH REALTY CORPORATION, GLENBOROUGH CORPORATION, ROBERT BATINOVICH AND ANTHONY BLUMBERG,

Respondents.

On Petition for a Writ of Certiorari to the California Court of Appeal for the First Appellate District

BRIEF IN OPPOSITION OF RESPONDENTS GLENBOROUGH REALTY CORPORATION, GLENBOROUGH CORPORATION AND ROBERT BATINOVICH

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105 pp

LIST OF PARTIES

The petition accurately lists the parties to the proceeding. Neither Glenborough Corporation nor Glenborough Realty Corporation have parents or nonwholly owned subsidiaries.

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1 Herbert B. Newberg & Alba Conte, *Newberg on Class Actions* §1.22 (3d ed. 1992) 13, 14

7A Charles Alan Wright et al., *Federal Practice & Procedure: Civil* §1775 (2d ed. 1986) 21, 24

STATEMENT OF THE CASE

Substantial evidence supports the conclusions of the courts below that, in an action to prevent the consolidation of eight faltering limited partnerships, claims for equitable relief predominated and defendants faced a risk of adjudications imposing upon them incompatible standards of conduct.

Based on these determinations, the California Court of Appeal held that a settlement class was properly certified under Federal Rules of Civil Procedure 23(b)(1) and 23(b)(2), and that the mandatory settlement did not run afoul of the due process protections set forth in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985).

The California Court of Appeal's analysis is in harmony with that of every Circuit Court of Appeals—including the Ninth Circuit—to have addressed mandatory certification since this Court decided *Shutts*. *See, e.g., Linney v. Cellular Alaska Partnership*, Nos. 97-16637-40, 1998 U.S. App. LEXIS 20484 (9th Cir. Aug. 21, 1998) (mandatory class certification appropriate where claims not "wholly or predominantly" for monetary damages). The petition, therefore, does not present a "conflict" in need of resolution by this Court. Rather, at issue is whether a trial judge abused his discretion in concluding that the plaintiff class was "of the type historically allowed under the terms of Rules 23(b)(1) and 23(b)(2)." Pet. 21.

The record below demonstrates that this action was properly certified as a no opt out class under both Rules 23(b)(1) and 23(b)(2), and that plaintiffs' claims for damages were, at most, incidental to their primary objective of altering the terms of the consolidation.

Moreover, the opt out right addressed by *Shutts* is implicated only where a state court otherwise lacks personal jurisdiction over plaintiff class members. Under *Shutts*, class members' minimum contacts obviate any need for an opt out right. Because the limited partnerships in which class members

held interests were organized under California law, plaintiffs had contacts with the State of California sufficient to establish the trial court's jurisdiction for purposes of the settlement.

Finally, by litigating the merits of the settlement in a California court, petitioners have waived any argument that the trial court's exercise of personal jurisdiction over them deprived them of due process. The petition should, therefore, be denied.

A. Formation Of The REIT.

The plaintiff class in this case consists of the former limited partners of eight partnerships, formed between 1979 and 1988. The purpose of the partnerships was to invest in real estate, hold it for periods of between three and fifteen years, and distribute anticipated returns. App. 2.

At the time of the proposed consolidation, only two of the eight partnerships had returned their limited partners' original investment. Units of the limited partnership were traded sporadically in the secondary market, and at a deep discount to their original cost and net asset value. *Id.*

Glenborough Corporation and Robert Batinovich,[1] who had assumed management of the partnerships during the period 1989-1991, sought to remedy investors' poor return and lack of liquidity. In September 1994, Glenborough proposed that the limited partnerships be merged with Glenborough Corporation into a publicly-traded real estate investment trust (the "REIT"), listed on the New York Stock Exchange.

The proposed consolidation offered limited partners a number of advantages over the partnerships' original structure. First, because REIT shares would be traded on a major exchange, the consolidation would provide investors with greater liquidity, which most investors consider beneficial. Second, the consolidation would allow limited partners to share

[1] Mr. Batinovich, Glenborough Corporation, and their affiliated entities are collectively referred to as "Glenborough."

in fees generated by Glenborough's management of various properties. Third, limited partners would enjoy a diversification of their assets, both with respect to the type of properties held and their geographic location. Fourth, the REIT would permit enhanced access to capital markets and greater opportunities for future growth and investment.

B. Allocation Of REIT Shares.

Glenborough filed a Form S-4 registration statement with the Securities and Exchange Commission ("SEC") describing how Glenborough Corporation and the limited partnerships would merge, and how shares in the newly-formed REIT would be distributed. Shares in the REIT were to be allocated between Glenborough and the limited partnerships as a group, according to their respective contributions to the REIT's cash flow. The registration statement referred to this as the Level I allocation. At Level II, the shares allocated in Level I to entities other than Glenborough Corporation were to be divided among the limited partnerships and the other contributors according to each asset's net asset value. At Level III, shares in the REIT were allocated between the general partners and the limited partners of each limited partnership, in accordance with the provisions of each partnership agreement. App. 3.

C. The Allegations Of Plaintiff's Complaint.

On February 21, 1995, plaintiff Anthony Blumberg filed a complaint challenging the fairness of the consolidation to the limited partners. Plaintiff alleged that the contribution of Glenborough Corporation, which plaintiff asserted was a worthless management company, did not warrant giving Glenborough a 20 percent interest in the REIT. Plaintiff also alleged that the consolidation would prevent the ultimate liquidation of the properties and that the consolidation had been contrived so that Glenborough could continue to earn property management fees. The consolidation, plaintiff asserted, constituted a breach of fiduciary duty. App. 3.

The complaint also alleged that "plaintiff and the members of the Class have sustained and will continue to sustain irreparable injury in the absence" of court action and that plaintiff lacked "an adequate remedy at law." Accordingly, the complaint prayed for a declaration "that the defendants have breached their legal duties to limited partners," and sought an order "enjoining Defendants from effectuating the Roll-Up." App. 21a. Ancillary to this relief, the complaint also prayed for rescission (if the consolidation were consummated before trial), an accounting, and for compensatory damages according to proof. *Id.*

D. Settlement Of The Action.

On April 6, 1995, the parties commenced discussions to explore the possibility of resolving the case. Glenborough agreed to provide plaintiff's counsel with non-public documents relating to, among other things, the proposed allocation of shares, including SEC comments on the registration statement. App. 3-4. Glenborough also promised not to attempt to "go effective" with the consolidation without providing plaintiff sufficient time to pursue formal discovery or seek an injunction, if necessary. App. 3-4.

One critical element of the settlement negotiations concerned Glenborough's transaction with Rancon Corporation ("Rancon"). Following the filing of the original registration statement with the SEC proposing the consolidation, Glenborough had entered with Rancon into a series of agreements granting an affiliate of Glenborough the right to provide partnership administration and property management services for nine real estate limited partnerships.

Given that the Level I allocation of REIT shares between Glenborough and the limited partnerships was based upon contributed cash flow, Glenborough argued to plaintiff's counsel that this significantly higher cash flow justified increasing Glenborough's Level I allocation of shares in the REIT from 20.2 percent to 29 percent. Glenborough said that it

would nevertheless leave its Level I allocation at the pre-Rancon level. App. 4. Plaintiff's counsel agreed to study the proposed revised terms of the transaction.

After consulting with an expert from Coopers & Lybrand, plaintiff's counsel concluded that the allocation of REIT shares between the limited partners and Glenborough approached the realm of reasonableness when compared to similar transactions. Counsel also reviewed the trading price and earnings multiples of similar REITs, as well as information concerning contributed debt, Glenborough's expenses and the fairness opinion of an outside consultant. Plaintiff's counsel satisfied themselves that, with the additional projected Rancon cash flow, the transaction's terms were reasonable. App. 4-5.

Plaintiff's counsel's investigation led them to conclude, however, that additional risk disclosures should be included in the Prospectus, and that further restrictions on the ability of management to issue and exercise stock options should be adopted. After negotiations concerning these terms, the parties reached an agreement in principle to settle the litigation on June 21, 1995. App. 5, 14-15.

The settlement called for, among other things, additional disclosures in the initial "Risk Factors" section concerning the lack of formal appraisal of Glenborough Corporation. It also required disclosures concerning anticipated management fees and the impact of the Rancon transaction. App. 15.

The settlement also imposed additional restrictions on management's stock sales. The "lock-up" on REIT shares owned by Glenborough management, preventing Glenborough from disposing of its stock, was extended from one year to two. The duration on the prohibition on the granting of stock options was also extended, and stock options with an exercise price of less than $15 per share were prohibited for one year. *Id.*

E. Certification Of The Settlement Class.

After an extensive process of documenting the agreement, the parties executed a final settlement agreement in October 1995. App. 5. Pursuant to that agreement, on October 11, 1995, the San Mateo Superior Court certified a settlement class of all limited partners in the limited partnerships under California Code of Civil Procedure Section 382 and Federal Rules of Civil Procedure 23(b)(1) and 23(b)(2). App. 27-28. The court also gave preliminary approval to the settlement, and scheduled a settlement hearing for December 21, 1995. Notice was mailed to the limited partners on November 15, 1995. App. 29, 31.

Due to the nature of the relief for which the settlement provided—additional risk disclosures and structural modifications to the consolidation—and the necessarily fixed allocation of REIT shares, the settlement did not permit opt outs. Had class members been permitted to opt out, plaintiffs who excluded themselves from the terms of the settlement would nevertheless have enjoyed the benefits of the settlement.

F. The Trial Court's Approval Of The Settlement.

Fourteen class members, including the six objectors who filed this petition, submitted objections in response to the notice. In order to permit all objectors to file briefs and other materials, the court continued the hearing on the settlement from December 21, 1995 to January 17, 1996. After the January hearing, the court accepted additional briefing from petitioners and responses from plaintiff Blumberg and the Glenborough defendants. In total, these submissions exceeded 2800 pages. In addition, another group of objectors filed a separate action in federal court, seeking (without success) to have the consolidation enjoined.

On June 6, 1996, the trial court issued a written decision granting plaintiff's motion for final approval of the settlement. The trial court made the following findings, among others:

- that plaintiff's counsel "demonstrated in their support of their request for approval, that their approach of cash-flow valuation, rather than relative asset valuation, is economically more realistic and is the one that is generally adopted in similar situations;"
- that plaintiff and Glenborough "engaged in negotiations, and certain modifications were made . . . requiring additional disclosures and imposing certain restrictions on the sale of the general partner's stock . . . and also imposing certain restrictions on management incentive options, and the exercise of such options;"
- that the court had "consider[ed] the benefits conferred on the settling class members by the settlement, and the risks faced by the settlement class members of establishing liability, causation and damages, and the likely probable duration and further expense of the likely burdensome and protracted litigation in the absence of settlement;"
- that the settlement "was entered in good faith;" and that "the settlement is fundamentally fair, adequate and reasonable to the respective parties to the settlement."

App. 49-52.

G. Solicitation Of Approval By The Limited Partners.

While the settlement approval process continued, a final Prospectus detailing the proposed consolidation was issued to the partnerships' limited partners on October 26, 1995. The Prospectus set a deadline of December 28, 1995 for voting on the transaction, one week after the scheduled settlement hearing. Eighty percent of limited partners who cast proxies voted to approve the consolidation. App. 6. Because the trial court continued the settlement hearing to permit additional briefing, the vote occurred and the transaction closed before the settlement received final approval.

H. Appellate Review Of The Settlement.

Petitioners appealed the trial court's decision to the California Court of Appeal, arguing that, for many fact-specific reasons, the settlement was unfair. Petitioners said that plaintiff's case had been strong on the merits, and that the Level I and Level II allocations of REIT stock unfairly benefited Glenborough. Petitioners also asserted that the settlement had not conferred a meaningful benefit on the class and that the trial court order certifying the settlement class and preliminarily approving the settlement had violated the trial court's local rules and California Code of Civil Procedure section 527.[2] Petitioners also argued that the mandatory settlement class had been improperly certified pursuant to Federal Rules of Civil Procedure 23(b)(1) and 23(b)(2) and that the settlement violated due process.[3]

The Court of Appeal rejected petitioners' arguments and affirmed the settlement. With respect to the mandatory settlement class, the court found that certification pursuant to Federal Rule of Civil Procedure 23(b)(1)[4] had been appropriate because "there was a likelihood of separate actions" and a "risk of inconsistent adjudications which could create potential conflicts for Glenborough, e.g., concerning required disclosures

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[2] The order preliminarily approving the settlement enjoined class members from filing other suits. Petitioners argued that to obtain such relief, the California Code requires parties to post a bond.

[3] Although California courts are not bound by Rule 23, the California Supreme Court "has directed state courts to follow rule 23 whenever California authority is lacking." App. at 21 (citing *City of San Jose v. Superior Court*, 12 Cal. 3d 447, 453 (1974)).

[4] Rule 23(b)(1) applies where "the prosecution of separate actions by or against individual members of the class would create a risk of (A) inconsistent or varying, adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests . . . ."

in the prospectus which would have to be disseminated class-wide, allocation of REIT shares, etc." App. 21.

The Court of Appeal concluded that certification was equally appropriate under Rule 23(b)(2),[5] affirming the trial court's implicit finding that the action was primarily for equitable relief:

> The complaint itself sought to enjoin consummation of the rollup, or, if the rollup closed, to rescind it absent a fair market evaluation of [Glenborough's] assets. It further asked for an accounting and for compensatory damages. The settlement itself provided for non-monetary relief. Of course damage claims were extinguished, but so, too was the right to hold up the rollup! The court did not abuse its broad discretion in implicitly deciding that equitable relief predominated.

App. 22.

The Court of Appeals also rejected each of the theories petitioners asserted would have entitled the class to substantial monetary relief. For example, petitioners had claimed that the Level I allocation was unfair to the limited partners because it was based upon contributed cash flow rather than a fair market valuation of the entities' assets. The Court of Appeal observed that petitioners had "disregarded" the parties' expert and other evidence showing that the valuation methods were commonly used in such consolidations. Moreover, the court noted, Glenborough Corporation's contributed cash flow had been heavily discounted because Glenborough "received 20.2 percent of the shares issued by the REIT while contributing 29.5 percent of the cash flow contributed to the REIT." App. 8.

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[5] Class certification pursuant to Rule 23(b)(2) is proper where "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole . . . ."

Petitioners had also complained that Glenborough Corporation's value had been overstated, and that the Rancon transaction would not benefit limited partners. The Court of Appeal disposed of this argument as well, noting that petitioners' objection "ignores [Glenborough Corporation's] cash flow contribution" and the fact that Glenborough "contributed substantial intangible assets to the REIT in the form of revenue streams from long-term management contracts." App. 9.

Petitioners had also argued that the Level II allocation was unfair, claiming that one of the partnerships owned substantially by Glenborough received a disproportionate interest in the REIT. The Court of Appeal again rejected petitioners' argument, showing that shares allocated to the partnership accurately reflected its net asset value. App. 10-12.

Finally, petitioners had asserted that the consolidation would prevent the liquidation of the partnerships' property holdings according to their original timetable. The Court of Appeal, however, noted that because the consolidated entity would be traded on the New York Stock Exchange, the consolidation afforded investors liquidity, and that the consolidation allowed investors to share in property management fees. The court also stated that a bulk liquidation of the properties would have resulted in discounts exceeding the entire cost of the consolidation, and that the cost of administering the REITs during a gradual liquidation would have eroded the return to the limited partners. App. 12-13.

The Court of Appeal concluded that members of the plaintiff class had been afforded due process:

> [W]here the claim for monetary relief does not predominate over claims for injunctive and declaratory relief, due process is satisfied *without* the opt out right where objectors are adequately represented by named plaintiffs; represented by a qualified attorney; provided with notice of the proposed settlement; given an opportunity to object; and assured that settlement will not go forward unless the trial court determines it to be fair, adequate and reasonable. *All these elements ensuring due process were present in this case.*

App. 23-24 (emphasis added) (citation omitted).

Petitioners sought review of the this decision by the California Supreme Court on March 30, 1998. The petition for review was denied on May 20, 1998.

REASONS FOR DENYING THE WRIT

The petition should be denied for at least four reasons. First, California and federal courts apply the same rule — that no opt out classes may properly be certified where monetary claims do not predominate or there is a risk of inconsistent judgments. There is no conflict between California and federal law. Second, substantial evidence supports certification of a no opt out class under these well-settled standards. Third, the settlement did not deprive class members of due process because they had minimum contacts with California sufficient for the California court to exercise *in personam* jurisdiction. This obviates the need for the additional procedural protection of a right to opt out. Finally, by litigating the merits of the settlement in the California trial court, petitioners waived any argument that California's exercise of jurisdiction deprived them of due process.

A. The Mandatory Class Was Certified Under The Same, Uncontroversial Standards Approved By The Federal Courts.

Where an action seeks a "wholly or predominantly money judgment," federal courts follow the teaching of *Shutts* and afford absent class members a right to opt out. Petitioners' suggestion, that the Ninth Circuit articulated a different standard in its decision *Brown v. Ticor Title Insurance Co.*, 982 F.2d 386 (9th Cir. 1992), *cert. dismissed*, 511 U.S. 117 (1994), has been rejected by the lower courts and, most recently, by the Ninth Circuit itself. California courts, including the courts below, also follow *Shutts*, requiring a right of exclusion where claims are predominantly monetary. *Bell v. American Title Ins. Co.*, 226 Cal. App. 3d 1589, 1610 (1991). Where plaintiffs seek predominantly equitable relief, and certification is proper under Rules 23(b)(1) and 23(b)(2), California's courts hold that the right of exclusion lies within the sound discretion of the trial court. *Id.*

1. This Court's holding in *Phillips Petroleum Co. v. Shutts*.

In *Shutts*, the defendant argued that a class certified by the Kansas state court improperly purported to bind non-resident plaintiff class members. Because many of the absent plaintiff class members lacked "minimum contacts" with Kansas, the defendant argued, the court lacked personal jurisdiction over class members. The defendant asserted that the Kansas court had thus exceeded its jurisdictional reach, depriving absent class members of due process. *Shutts*, 472 U.S. at 806.

This Court rejected the defendant's jurisdictional challenge. It held that because the burdens of litigation upon absent plaintiff class members are fewer than those imposed upon absent defendants, the "Due Process Clause need not and does not afford the former as much protection from state-court jurisdiction as it does the latter." *Shutts*, 472 U.S. at 811. Thus, the Court held, states may exercise personal jurisdiction over absent class members in actions "concerning claims wholly or

predominately for money judgments," so long as class members receive notice and an opportunity to opt out. *Id.* at n.3.

Shutts does not reach the question of whether courts may constitutionally bind absent class members in actions not "wholly or predominately" seeking money damages without affording an opt out right.

2. Federal Rule of Civil Procedure 23.

The Federal Rules of Civil Procedure, however, which are presumptively constitutional, *Hanna v. Plumer*, 380 U.S. 460, 471 (1965), do speak to the circumstances under which mandatory classes may be certified. Since 1966, the Federal Rules have permitted no opt out classes where either (1) the defendant is subject to the risk of multiple, inconsistent adjudications or (2) the plaintiff seeks primarily equitable relief.[6] Rule 23(c)(2) requires that members of classes certified pursuant to Rule 23(b)(3) be allowed to exclude themselves; no such opt out right is afforded under Rules 23(b)(1) or 23(b)(2). *See Proposed Rules of Civil Procedure, Advisory Committee's Notes*, 39 F.R.D. 69, 100 (1966) (certification pursuant to (b)(1) provides "a ready and fair means of achieving unitary adjudication"); 105 (judgment in a class action under (b)(1) or (b)(2) binding on "class members"; in (b)(3), binding only upon those to whom notice was sent and who did not request exclusion); *Howard v. McLucas*, 782 F.2d 956, 961 (11th Cir. 1986); *In re Jackson Lockdown/MCO Cases*, 107 F.R.D. 703, 710-13 (E.D. Mich. 1985); *Avagliano v. Sumitomo Shoji Am., Inc.*, 107 F.R.D. 748, 749 (S.D.N.Y. 1985).

The reasons for permitting mandatory classes under Rules 23(b)(1) and 23(b)(2) are compelling, as Mr. Newberg points out:

> Because class actions under Rule 23(b)(1) or (2) are designed to avoid inconsistent adjudications or prejudice arising from separate suits by individuals

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[6] Even petitioners do not claim that *Shutts* overruled Rule 23 *sub silentio*.

> similarly situated . . ., they are analogous to interpleader or quasi-in-rem suits in which equitable circumstances dictate the need for a unitary adjudication . . . . The societal cost of permitting opt-outs for the purpose of individual adjudications . . . could be enormous, compared to the modest gains at best in constitutional terms for additional individual procedural rights. Thus, the opt-out due process right for class members in common question [*i.e.*, Rule 23(b)(3)] class actions, which *Shutts* held is tantamount to implied consent to jurisdiction in the absence of exercising such exclusion right after notice, would also seem to be an unnecessary element of procedural due process in class suits that are traditionally maintained on a no-opt-out basis, regardless of individual consent of class members.

1 Herbert B. Newberg & Alba Conte, *Newberg on Class Actions* § 1.22, at 1-51 (3d ed. 1992). *See also Advisory Committee's Notes, supra*, 39 F.R.D. at 100 ("The difficulties which would be likely to arise if resort were had to separate actions by or against the individual members of the class [in Rule 23(b)(1) actions] furnish the reasons for, and the principal key to, the propriety and value of utilizing the class-action device.").

Every Circuit Court of Appeals to have considered the question after *Shutts* has concluded that, so long as claims for monetary damages do not predominate, a class may be properly certified under Rules 23(b)(1) and 23(b)(2). *See, e.g., Allison v. Citgo Petroleum Corp.*, No. 96-30489, 1998 U.S. App. LEXIS 20171, at *17 (5th Cir. Aug. 18, 1998); *Thomas v. Albright*, 139 F.3d 227, 235 (D.C. Cir. 1998), *petition for cert. filed* (August 24, 1998) (No. 98-326); *Probe v. State Teachers' Retirement Sys.*, 780 F.2d 776, 780 (9th Cir.), *cert. denied*, 476 U.S. 1170 (1986).

3. The Ninth Circuit has not exceeded the limited holding of *Shutts*.

The petition contends that in *Brown v. Ticor Title Insurance Co.*, 982 F.2d 386 (9th Cir. 1992), *cert. dismissed*, 511 U.S. 117 (1994), the Ninth Circuit "held unequivocally" that where a class action purports to bind absent class members concerning claims for "substantial damages," due process is violated. Pet. 4. The petition states that the Ninth Circuit thus announced a new due process standard, beyond the explicit scope of *Shutts*. Pet. 18.

The petition misstates Ninth Circuit law. For years, unchallenged Ninth Circuit authority has provided that where an action is properly certified pursuant to Rules 23(b)(1) and 23(b)(2), a court may, in its sound discretion, preclude class members from exercising an opt out right. *See, e.g., Probe v. State Teachers' Retirement Sys.*, 780 F.2d 776, 780 (9th Cir.), *cert. denied*, 476 U.S. 1170 (1986); *Green v. Occidental Petroleum Corp.*, 541 F.2d 1335, 1339 (9th Cir. 1976).

Brown did not purport to overturn that precedent. In 1985, class action claims against several title insurance companies were filed in Pennsylvania. In 1986, a Pennsylvania district court certified a mandatory settlement class pursuant to Rules 23(b)(1) and 23(b)(2) after determining that the defendants faced the risk of inconsistent adjudications and that the relief sought was primarily equitable. *In re Real Estate Title and Settlement Servs. Antitrust Litig.*, 1986-1 Trade Cas. (CCH) ¶ 67,149 at 62,928 (E.D. Pa. 1986), *aff'd without op.*, 815 F.2d 695 (3d Cir. 1987), *cert. denied*, 485 U.S. 909 (1988).

Thereafter, certain members of the settlement class filed an action in Arizona state court reasserting the released claims. That case was enjoined by the Arizona federal district court on the grounds that the action interfered with the prior federal judgment in Pennsylvania. The Third Circuit reversed. *In re Real Estate Title and Settlement Servs. Antitrust Litig.*, 869 F.2d 760 (3d Cir. 1989). Without reaching the question of whether

the plaintiffs had been denied adequate due process by the settlement, the Third Circuit held that, because the plaintiffs lacked minimum contacts with Pennsylvania, the Pennsylvania court could not enjoin the plaintiffs from collaterally attacking the judgment elsewhere. *In re Real Estate Title*, 869 F.2d at 765.

Specifically, the Third Circuit noted that while Congress has, in some instances, required plaintiffs to litigate their claims in particular fora, Congress never indicated that a plaintiff, lacking minimum contacts with the class action forum, which had "substantial damage claims should nonetheless be forced to bring its collateral challenge in that forum." 869 F.2d at 767. Because the Third Circuit concluded that the judgment in the Pennsylvania court had released "substantial damage claims" in which the plaintiffs had a property interest, and because the Pennsylvania court lacked personal jurisdiction over the Arizona plaintiffs, the plaintiffs were permitted to bring a collateral challenge to the settlement in Arizona. *In re Real Estate Title*, 869 F.2d at 767-68.

The plaintiffs in *Brown*, other settlement class members, filed suit in the Arizona federal district court. The court held that the plaintiffs' claims were barred by *res judicata*. The plaintiffs appealed to the Ninth Circuit. *Brown*, 982 F.2d at 389-90.

In its decision reversing the district court, the Ninth Circuit did not address whether it believed itself bound by the Pennsylvania district court's 1986 determination that the claims in the prior litigation were primarily equitable. Instead, the Ninth Circuit stated only that it would follow the Third Circuit's "holding" that the Pennsylvania judgment foreclosed "substantial damage claims." Relying on *Shutts*, the court observed that where monetary claims predominate, a right of exclusion must be granted. Because the Pennsylvania settlement class had been mandatory, the Ninth Circuit concluded that due process had been violated. *Brown*, 982 F.2d at 392.

Petitioners argue that by referring to "substantial" rather than "predominant" damage claims, the Ninth Circuit lowered the threshold at which due process requires a right of exclusion. But the Ninth Circuit did not distinguish between "substantial" claims and "predominant" claims, or indicate that it was exceeding this Court's holding in *Shutts*. To the contrary, the Ninth Circuit explicitly recognized that "*Shutts* is limited to claims 'wholly or predominantly for money judgments.' " *Brown*, 982 F.2d at 392 (quoting *Shutts*, 472 U.S. at 811 n.3).

Subsequent decisions confirm that, although *Brown*'s language is "a little broad and imprecise," *Arnold v. United Artists Theatre Circuit, Inc.*, 158 F.R.D. 439, 463-64 (N.D. Cal. 1994), the Ninth Circuit did not intend to contradict its own precedent or exceed the limited holding of *Shutts*.[7]

In one of the first lower court decisions to consider *Brown*, *White v. National Football League*, 822 F. Supp. 1389 (D. Minn. 1993), *aff'd on other grounds*, 41 F.3d 402 (8th Cir. 1994), for example, the district court certified a mandatory settlement class. Reviewing the implications of the *Brown* decision, it concluded:

> The *Brown* case does not alter the constitutional standards articulated in *Shutts* and, in fact, expressly recognizes that "*Shutts* is limited to claims 'wholly or predominantly for money judgments.' " At most, Brown stands for the proposition that where a class action involves claims "wholly or predominantly" for

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[7] It was the Ninth Circuit's imprecision that led this Court to grant certiorari in *Brown*, later dismissed as improvidently granted. *See Ticor Title Ins. v. Brown*, 511 U.S. 117, 125 (1994) (O'Connor, J. dissenting) ("[A]lthough we held in [*Shutts*] that there is a constitutional right to opt out of class actions brought in state court, that holding was expressly 'limited to those class actions which seek to bind known plaintiffs concerning claims wholly or predominately for money judgment . . .' The Ninth Circuit's rule, by contrast, applies whenever 'substantial damage claims' are asserted.") (citations omitted). As discussed below, that perceived conflict was recently clarified by the Ninth Circuit.

> money damages, and where the settlement of such class action accords only injunctive relief and no damage recovery, an absent nonresident class member's later claim for damages will not be barred.

822 F. Supp. at 1412 (emphasis in original).

Similarly, in *Arnold*, the district court acknowledged that while the language of *Brown* was muddled, the Ninth Circuit's exclusive reliance on *Shutts* made it clear that "under *Ticor* and *Shutts*, the constitutional due process requirement of notice to absent class members applies only to cases where claims for monetary damages 'predominate.'" *Arnold*, 158 F.R.D. at 464 (emphasis in original).

Most importantly, the Ninth Circuit itself has clarified its holding in *Brown*. Three days after this petition was filed, the Ninth Circuit held that "due process requires the option to opt-out only in the limited set of claims that are 'wholly or predominately for money judgments.'" *Linney v. Cellular Alaska Partnership*, Nos. 97-16637-40, 1998 U.S. App. LEXIS 20484, at *13 (9th Cir. Aug. 21, 1998) (quoting *Shutts*, 472 U.S. at 811 n.3).

In *Linney*, limited partners sued their general partner for breach of contract and breach of fiduciary duty. After one proposed settlement was rejected by the district court as inadequate, the parties reached a proposed settlement providing for equitable relief and a settlement fund.

Objectors challenged the settlement, arguing that the class had been inadequately represented. They asserted that the mandatory nature of the settlement deprived the class of due process because class members could not avoid releasing their damage claims. *Linney*, 1998 U.S. App. LEXIS 20484, at *12.

Explicitly relying on its decision in *Brown*, the Ninth Circuit rejected this argument:

> [A]ppellants argue that new class counsel erred by not insisting that the class be allowed to opt-out of the

> monetary portion of the settlement, citing cases to suggest that the option to opt-out is required where monetary relief is sought in addition to injunctive relief. *However, this court has held that due process requires the option to opt-out only in the limited set of claims that are "wholly or predominately for money judgments."*

Id. at *12-13 (emphasis added) (citations omitted). The court then reaffirmed the viability of longstanding Ninth Circuit precedent holding that denial of a right of exclusion in cases certified pursuant to Rule 23(b)(2) lies within the sound discretion of the trial court. *Id.* at *13 n.3, 20 n.6.

There is, therefore, no decision adopting the due process test petitioners propose here, that the presence of "substantial" damages precludes certification of a mandatory class.[8]

4. California courts follow Rule 23 and *Shutts*.

Rule 23(b) and this Court's holding in *Shutts* are precisely the standards applied by California courts in determining whether to certify a class action and whether due process requires the right of absent class members to opt out. Where claims are predominantly for money damages, California courts permit class members a right of exclusion. A right to exclusion is discretionary where the class is certified pursuant to Rules 23(b)(1) and 23(b)(2). *Bell v. American Title Ins. Co.*, 226 Cal. App. 3d 1589, 1603 (1991).

In *Bell*, objectors to a settlement argued that the trial court's preclusion of opt outs had deprived them of due

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[8] *Clarke v. Advanced Private Networks, Inc.*, 173 F.R.D. 521 (D. Nev. 1997) does not adopt the "substantial damages" test posited by petitioners. In *Clarke*, the district court denied a motion for mandatory class certification. Citing *Brown*, the court found an opt out right was required because "[w]hile the complaint incidentally seeks to enjoin interference with partnership management, diversion of partnership assets, and a turn-over order, *damages quite plainly is the primary relief sought.*" *Id.* at 523 (emphasis added). This holding is entirely consistent with *Shutts* and *Linney*.

process. The Court of Appeal concluded that, under *Shutts*, absent class members must receive the right to "opt out" of class actions seeking to bind plaintiffs "concerning claims wholly or predominantly for money judgments." *Bell*, 226 Cal. App. 3d at 1609 (quoting *Shutts*, 472 U.S. at 811 n.3). The *Bell* court held, however, that the trial court had not abused its discretion in precluding opt outs because the settlement class had been certified under Rules 23(b)(1) and 23(b)(2), the action was not predominately for monetary relief, and the plaintiff class consisted of owners of California real property, thereby satisfying the minimum contacts test for personal jurisdiction. *Id.*, 226 Cal. App. 3d at 1609-11.

California's interpretation of Rule 23 and *Shutts* is thus consistent with every post-*Shutts* Court of Appeals decision addressing mandatory classes. Because the conflict between California and federal law suggested by petitioners does not exist, the petition should be denied.

B. The Class Was Properly Certified Pursuant To Rules 23(b)(1) And 23(b)(2).

The petition seeks review, then, not of a legal conflict, but of the fact-intensive question of whether the trial court abused its discretion in finding the settlement class to be "of the type historically allowed under the terms of Rules 23(b)(1) and 23(b)(2)." Pet. 21.

California's trial courts are afforded wide discretion in determining whether and how a class is certified. *See Bell*, 226 Cal. App. 3d at 1603 ("The trial court has great discretion in decisions on certifying class actions."); *Frazier v. City of Richmond*, 184 Cal. App. 3d 1491, 1503 (1986) (trial court's decision concerning whether to provide opt out "should not be upset on appeal in the absence of an abuse of the trial court's discretion"). Here, the record confirms the conclusions of the courts below that this mandatory class was properly certified pursuant to Rules 23(b)(1) and 23(b)(2), and that class members were afforded due process.

1. Defendants faced a high risk of inconsistent adjudications.

Rule 23(b)(1) provides that certification is appropriate where "the prosecution of separate actions by or against individual members of the class would create a risk of . . . inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class." In order to certify a class pursuant to subsection (b)(1), there "must be a risk that separate actions will in fact be brought if a class action is not permitted." 7A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure: Civil* § 1773, p. 427 (2d ed. 1986).

In this case, the risk of multiple inconsistent adjudications was significant. Shortly after the trial court granted preliminary approval of the settlement, a separate federal action was filed seeking to enjoin the consolidation. App. 21. Petitioners, moreover, made it very clear that they would pursue separate litigation if allowed to do so.

Had multiple actions been permitted to proceed, they could have resulted in irreconcilable rulings governing Glenborough's conduct with respect to the consolidation. For example, had one court found the merger beneficial, and instructed Glenborough to complete the consolidation as required by the limited partners' proxy vote, while another found the merger to violate the general partners' fiduciary duties and ordered it abandoned, Glenborough would have been confronted with mutually exclusive orders.

Similarly, different courts could have mandated varying allocations of REIT shares among the various entities contributing assets. If in one case, a court determined that the increased cash flow contributed by the Rancon transaction justified an allocation of 29 percent of the REIT shares to Glenborough, while another court determined that the 20 percent allotted Glenborough was fair, and still another concluded Glenborough should receive only 10 percent, the consolidation

would have been unworkable. Or, had courts come to differing conclusions concerning the adequacy of disclosures in the Prospectus, Glenborough would have faced the impossible task of producing distinct versions of a document that must, as a matter of law, be distributed class-wide. App. 21.

As a result, the trial court concluded there was a risk of multiple inconsistent adjudications and certified the class pursuant to Rule 23(b)(1). The Court of Appeal agreed, finding that the record reflected "a likelihood of separate actions" and thus "a risk of inconsistent adjudications." App 21.

In arguing that certification under Rule 23(b)(1) was "insupportable," petitioners ignore each of these points. Rather, petitioners assert that "the mere fact that some plaintiffs might be successful in individual lawsuits against a defendant while others may not is not a ground for invoking Rule 23(b)(1)(A)." Pet. 22. Neither the parties, the trial court nor the Court of Appeal, however, ever relied upon such a theory in support of class certification.

2. Plaintiffs' claims were predominantly equitable.

Certification of a mandatory class is also appropriate where the relief sought is predominantly equitable in nature. Rule 23(b)(2) provides for class certification where "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Federal courts, including the Ninth Circuit, hold that "[c]lass actions certified under Rule 23(b)(2) are not limited to actions requesting only injunctive or declaratory relief, but may include cases that also seek monetary damages." *Linney*, 1998 U.S. App. LEXIS 20484, at *13 (quoting *Probe*, 780 F.2d at 780).

Like the federal courts, "California courts have . . . afforded rule 23(b)(2) status where the final relief sought includes both injunctive relief and monetary damages." *Bell*, 226 Cal. App. 3d at 1606 (citing *Frazier*, 184 Cal. App. 3d at

1501 (certifying pursuant to (b)(2) where case not predominantly for monetary damages)). Thus, in determining whether to certify a class pursuant to subsection (b)(2) in a case seeking monetary and non-monetary relief, California's courts look to whether the requested monetary relief predominates. *Bell*, 226 Cal. App. 3d at 1606.

In this case, plaintiffs sought predominantly equitable relief.[9] The complaint sought to enjoin the consolidation (or asked for rescission if the consolidation closed) unless there was a fair and independent valuation of the assets contributed by Glenborough. As plaintiff Blumberg's counsel declared under penalty of perjury:

> When we filed suit, our primary orientation was to challenge the . . . allocations (i.e., maximizing the shares allocable to the partnerships), [to] supplement the risk disclosures of the transaction to the limited partners, and to achieve as much protection as possible for the post-rollup market value of the shares received.

App. 24a-25a.

Indeed, it was the predominance of claims for equitable relief that initially formed the basis of petitioners' opposition to the settlement's release of damage claims. In their brief, petitioners told the trial court that the "focus of the original Complaint was for injunctive relief — *i.e.*, to prevent the Consolidation. . . ." App. 35a. Petitioners also represented that "injunctive relief would end this litigation in days." App. 66a.

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[9] This case is, therefore, distinguishable from *Adams v. Robertson*, 520 U.S. 83, 117 S. Ct. 1028 (1997), in which the Court granted, and later dismissed, certiorari. That case concerned allegations that an insurance company had encouraged insureds to exchange existing policies for more expensive ones providing less coverage, claims best addressed through monetary damages. As the petitioners told the Court, unlike this case, *Adams* "primarily involv[ed] claims for monetary relief." *Adams*, 520 U.S. at , 117 S. Ct. at 1029.

Petitioners can hardly blame the trial court for agreeing that the action sought primarily injunctive relief.

Petitioners also assert that because, by the time the settlement had finally been approved, the consolidation had occurred and the disclosures and limitation on trading of the shares were in place, defendants' actions had rendered "moot" the equitable relief originally sought.[10] Without citation to authority, petitioners assert that, as a result, the equitable claims were no longer "predominant," rendering Rule 23(b)(2) certification inappropriate. Pet. 24.

Courts and commentators agree, however, that actions taken by a defendant after a lawsuit is filed cannot change the nature of the plaintiff's claims, nor will such action defeat class certification. *See Scott v. City of Anniston, Ala.*, 682 F.2d 1353, 1358 (11th Cir. 1982) ("[A] class action properly brought under Rule 23(b)(2) need not be reclassified under (b)(3) merely because a change in the defendant's conduct made injunctive relief inappropriate."); *Arkansas Educ. Ass'n v. Board of Educ., Portland, Ark., Sch. Dist.*, 446 F.2d 763 (8th Cir. 1971); *Rodgers v. U.S. Steel Corp.*, 69 F.R.D. 382 (W.D. Pa. 1975); 7A Wright, *Federal Practice & Procedure* § 1775 at 467-68.

Nor do petitioners' characterization of the money damages at stake, unsupported by the record, alter the nature of the litigation. Petitioners assert that claims "with an estimated value of between $10 and $20 million" were released. Pet. 3. In fact, the record shows plaintiffs' damage claims were completely meritless. Indeed, in analyzing the fairness of the settlement, the Court of Appeal considered and refuted each argument mustered by petitioners in support of their alleged damages. App. 7-14. Petitioners do not even attempt to rebut the Court of Appeal's conclusions.

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[10] The consolidation was consummated before the settlement was finally approved only because of the delay caused by petitioners' challenge to the settlement. Moreover, as the Court of Appeal noted, the consolidation had not occurred at the time the class was certified. App. 21 n.6.

After a thorough review of the record, the Court of Appeal held that the trial court had acted within its sound discretion in determining plaintiffs' claims for equitable relief predominated and in certifying the class pursuant to Rule 23(b)(2):

> The complaint itself sought to enjoin consummation of the rollup, or, if the rollup closed, to rescind it absent a fair market evaluation of [Glenborough's] assets. It further asked for an accounting and for compensatory damages. The settlement itself provided for non-monetary relief. Of course damage claims were extinguished, but so, too was the right to hold up the rollup! The court did not abuse its broad discretion in implicitly deciding that equitable relief predominated.

App. 22.[11] The petition offers no basis to disturb this conclusion.

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[11] Without citation to the record, petitioners claim that the Court of Appeal "focuse[d] unduly on the consideration *received* in the settlement . . . rather than on the claims released in the settlement." Pet. 18 (emphasis in original). To the contrary, as the opinion makes clear, the court considered both the nature of the relief sought and the relief obtained. App. 22. Moreover, as the Ninth Circuit's decision in *Linney* shows, courts may properly weigh the relief afforded by a settlement in determining the nature of the claims. *Linney*, 1998 U.S. App. LEXIS 20484, at *13 (comparing monetary value of settlement's equitable consideration with value of settlement fund).

C. All Class Members Had Minimum Contacts With California By Virtue Of Their Ownership Of Interests In California Limited Partnerships.

As discussed above, *Shutts* held that in a class action primarily for money damages, an out-of-state class member is not bound unless the forum state provides procedural due process protections. Those protections include providing absent class members with the opportunity to opt out or remove themselves from the class. *Shutts*, 472 U.S. at 812.

The burdens imposed by litigation upon an absent class-action plaintiff are far less significant than those placed upon an absent defendant. *Shutts*, 472 U.S. at 808. The class action device "protects the interests of absent plaintiffs through court inquiry into the common nature of all claims, the adequacy of representation, proper jurisdiction over the class, as well as a judicial determination of the fairness and adequacy of any proposed settlement agreed upon by the parties." *Grimes v. Vitalink Communications Corp.*, 17 F.3d 1553, 1560 n.8 (3d Cir.) (finding that mandatory state court class settlement released all claims related to a merger) (citing *Shutts*, 472 U.S. at 809-10), *cert. denied*, 513 U.S. 986 (1994).

In this case, each absent class member had sufficient minimum contacts with the State of California to support the trial court's exercise of specific jurisdiction over their claims. The class members each held an interest in a California limited partnership that participated in the consolidation.

Grimes v. Vitalink is directly on point. In *Grimes*, a non-resident class member owned stock in a Delaware corporation. He surrendered those shares in response to a tender offer. The Third Circuit held that he had sufficient contact to establish specific jurisdiction and bind himself to a class settlement and release entered by a Delaware state court. *Grimes*, 17 F.3d at 1569. The Third Circuit held that specific jurisdiction "requires only that a party be shown to have committed at least one act in the relevant forum which is substantially related to the claim

being adjudicated." *Id.* at 1559. "[T]he law has long put the buyer of corporate stock on notice that corporate rights attaching to stock ownership may be adjudicated in a single proceeding in another jurisdiction, including at a minimum the corporation's state of incorporation." *Id.* (quoting *Hynson v. Drummond Coal Co.*, 601 A.2d 570, 579 (Del. Ch. 1991)).[12]

The absent class members' ownership of interests in partnerships organized under California law is equivalent to the stock ownership in *Grimes* and establishes the necessary minimum contacts to support the exercise of personal jurisdiction over claims challenging the consolidation of their limited partnership interest into the REIT. Accordingly, the opt out right required by *Shutts* to support personal jurisdiction over absent class members is not implicated here.

Petitioners assert that in *Epstein v. MCA, Inc.*, 126 F.3d 1235 (9th Cir. 1997), the Ninth Circuit "stat[ed] that the constitutional right to opt out is *not* limited to those absent class members over whom" the court lacks jurisdiction. Pet. 4-5 (emphasis in original). *Epstein*, say petitioners, therefore conflicts with *Grimes*.

Epstein, however, held that *adequate representation* is a prerequisite to binding absent class members to a judgment, regardless of whether class members had "minimum contacts" with the forum. 126 F.3d at 1241-42. *Epstein* did not involve the right to opt out. While in *dicta*, the Ninth Circuit disapproved of *Grimes*' broader interpretation of the opt out right in *Shutts*, the holdings of *Grimes* and *Epstein* simply do not conflict.[13]

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[12] According to *Hynson*, "merely holding . . . the shares of a corporation of that state itself creates a sufficient relationship with that jurisdiction to permit that jurisdiction to be one in which rights attaching to stock of the corporation may be conclusively adjudicated." 601 A.2d at 572.

[13] Petitioners also misread *Brown* as holding that the right to opt out "is not limited to persons over whom the trial court lacks *in personam* jurisdiction . . . ." Pet. 27. *Brown*, which involved Arizona plaintiffs' challenge to a Pennsylvania judgment, did not even discuss this issue.

D. Petitioners Do Not Have Standing To Complain About The Mandatory Class Since They Are Not Aggrieved Parties.

Finally, petitioners consented to the trial court's jurisdiction and therefore are not aggrieved parties as to the no opt out class. Personal jurisdiction is an individual liberty interest derived from the Due Process Clause of the Fourteenth Amendment. *Shutts*, 472 U.S. at 807. A plaintiff can therefore waive the personal jurisdiction requirement. *Id.* at 812 ("[a]ny plaintiff may consent to jurisdiction"). Petitioners have waived any jurisdictional challenge here.

First, petitioners did not cite to any evidence of their domiciles, and therefore have not shown that they lacked minimum contacts with California. This is not surprising since they did not raise the *Shutts* argument in the trial court. Rather, another non-appealing group of objectors raised this argument at the supplemental briefing stage. Petitioners cannot assert errors that allegedly affected only other class members. *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974); *Bailey v. Patterson*, 369 U.S. 30, 32-33 (1962).

Second, even assuming that all the petitioners are not Californians, they consented to the trial court's jurisdiction by appearing and pursuing their objections on the merits. *DeBoer v. Mellon Mortgage Co.*, 64 F.3d 1171, 1175 (8th Cir. 1995) ("When an objector submits to the court's jurisdiction, however, the Shutts dilemma is avoided."), *cert. denied*, 517 U.S. 1156 (1996).[14] Thus, petitioners lack standing to assert on appeal that the no opt out class violated their due process rights.

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[14] Of course, a "party to a mandatory class action who appears in court to contest inclusion in the class is analogous to a party who appears merely to contest jurisdiction, and should be deemed to consent to jurisdiction *only if it actually litigates the . . . underlying merits of the case.*" *White v. National Football League*, 41 F.3d 402, 407-08 (8th Cir. 1994), *cert. denied*, 515 U.S. 1137 (1995) (emphasis added). In challenging the underlying merits of the case, petitioners have "shown a willingness to engage in extensive litigation in the forum." *In re Real Estate Title*, 869 F.2d at 771. In this case, therefore, petitioners "have had their day in court to point out the shortcomings of . . . the settlement on the merits." *DeBoer*, 64 F.3d at 1176.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Dated: September 18, 1998

Respectfully submitted,

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(Additional Plaintiff's Counsel Appear on Signature Page)

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR SAN MATEO COUNTY

ANTHONY E. BLUMBERG, on behalf of himself and all others similarly situated,	) CASE NO.) CLASS ACTION.
Plaintiff,	)
v.	)
GLENBBOROUGH REALTY CORPORATION (A CALIFORNIA CORPORATION); GLENBOROUGH CORPORATION (A CALIFORNIA CORPORATION); and ROBERT BATINOVICH,	)

Defendants,	) CLASS ACTION
	) COMPLAINT FOR
EQUITEC INCOME REAL ESTATE INVESTORS B, (A CALIFORNIA LIMITED PARTNERSHIP); EQUITEC INCOME REAL ESTATE INVESTORS C (A CALIFORNIA LIMITED PARTNERSHIP; EQUITEC INCOME REAL ESTATE INVESTORS-EQUITY FUND 4 (A CALIFORNIA LIMITED PARTNERSHIP); EQUITEC MORTGAGE INVESTORS FUND IV (A CALIFORNIA LIMITED PARTNERSHIP); EQUITEC 79 REAL ESTATE INVESTORS (A CALIFORNIA LIMITED PARTNERSHIP); OUTLOOK PROPERTIES FUND IV (A CALIFORNIA LIMITED PARTNERSHIP); GLENBOROUGH ALL SUITE HOTELS L.P. (A CALIFORNIA LIMITED PARTNERSHIP; GLENBOROUGH PENSION INVESTORS (A CALIFORNIA LIMITED PARTNERSHIP); and GLENBOROUGH REALTY TRUST INCORPORATED (A MARYLAND CORPORATION),	) 1. Breach of Fiduciary Duty) 2. Breach of Duty of Good Faith and Fair Dealing) AND PRAYER FOR INJUNCTIVE RELIEF
Nominal Defendants.	)

Plaintiff, by and through his undersigned attorneys, alleges upon information and belief, except as to himself, which facts are alleged on knowledge, as follows:

NATURE OF THE ACTION

1. This is a Class Action, brought by plaintiff, for himself and on behalf of all limited partner unitholders in eight real estate limited partnerships (the "Limited Partnerships" or "Partnerships") organized and existing under California law. Each of the Partnerships and the holders of their partnership units is similarly situated. Through this action, Plaintiff seeks injunctive relief and compensatory damages for himself and all other similarly situated unitholders arising from a proposed roll-up transaction (the "Roll-Up") being effected by the defendants whereby plaintiff and class members would exchange their current Limited Partnership interests for shares in a newly-formed corporation, Glenborough Realty Trust Incorporated ("GRTI"), which would then control, through an affiliate, the Partnerships' assets. The Roll-Up has the purpose and effect of unfairly entrenching management and of shifting upwards of 20% of the ownership of Partnership assets to the general partner defendants at the expense of plaintiff and members of the class.

2. Defendants, by means of the Roll-Up, are violating and will violate the rights of each and every class member. Defendants have geared the transaction to thwart the maximization of investment returns by class members through sale of the properties, substituting the Roll-Up for that sale. The Roll-Up is motivated solely by defendants' self-interested plan to maintain, entrench, and guarantee their positions of control over the Limited Partnerships' operations and defendants' receipt of on-going management fees. The Roll-Up is also designed and intended transfer over 20% of the assets of the Partnerships to the general partner defendants in return for an insolvent company. The actions of defendants in structuring the Roll-Up and their other actions taken in conjunction with

the Roll-Up constitute concerted action against the interests of Plaintiff and the class in violation of defendants' fiduciary duties under California law and their duty of good faith and fair dealing.

3. The general partner defendants have thus breached their fiduciary duties and their duty of good faith and fair dealing owed to plaintiff and the class members. Specifically, these defendants have devised ratios to allocate the securities to be issued in the Roll-Up which grossly favor said defendants and which do not accurately reflect the current fair have proposed for issuance and dissemination a misleading prospectus and consent solicitation statement to solicit and coerce the approval of the Roll-Up scheme. Plaintiff and class members have been and will be deceived, manipulated, frustrated, and damaged by defendants' actions. Plaintiff, individually and for the Class, seeks relief for injury suffered and to be suffered as a result of the defendants' breach of fiduciary duties and self-dealing in connection with their RollUp scheme, as set forth in this Complaint.

THE PARTIES

4. Plaintiff Anthony E. Blumberg is an individual who owns 20 units of Equitec Realty Income Partnership B, originally purchased for $5,000 during its initial public offering period. Plaintiff is being injured and threatened with injury by defendants' unlawful acts in the same manner as all other members of the proposed class, pursuant to a common scheme directed at all class members by defendants.

5. Defendant Glenborough Realty Corporation ("GRC") is a California corporation with its principal place of business in San Mateo, California. Defendant GRC is a wholly-owned subsidiary of defendant Glenborough Corporation. GRC has been one general partner of the eight Limited Partnerships that are the subject of the Roll-Up: Equitec Income Real Estate Investors B ("Equitec B"), Equitec Income Real Estate

Investors C ("Equitec C") Equitec Income Real Estate Investors—Equity Fund 4 ("Equitec 4"), Equitec Mortgage investors Fund IV ("Equitec Mortgage IV"), Equitec 79 Real Estate Investors ("Equitec 79"), Outlook Properties Fund IV ("Outlook IV"), Glenborough All Suite Hotels, L.P. ("All Suites") and Glenborough Pension Investors ("GPI"). GRC has been general partner of the Limited Partnerships since the date of final approval of general partner substitution indicated below:

Partnership:	Date:
Equitec B	February 18, 1992
Equitec C	February 18, 1992
Equitec 4	February 25, 1992
Equitec Mortgage IV	February 13, 1992
Equitec 79	April 9, 1992
Outlook IV	May 6, 1992
All Suites	February 22, 1994
GPI	April 4, 1994

6. Defendant Glenborough Corporation is a California corporation with its principal place of business in San Mateo, California, which is controlled by defendant Robert Batinovich and his affiliates. GC owns all of the issued and outstanding shares of GRC.

7. Defendant Robert Batinovich ("Batinovich") is the President of GRC. Defendant Batinovich maintains a business office in San Mateo, California. Robert Batinovich has been the other general partner of the eight Limited Partnerships since the same dates of final approval of general partner substitution indicated above. Defendant Batinovich controls GRC through his ownership and control over GC.

8. Defendants GC, GRC and Batinovich are collectively referred to herein as the "General Partner Defendants." By virtue of their position and their ability to control and direct the affairs of the Limited Partnerships, the General Partner Defendants are in a fiduciary relationship with plaintiff and

class members, and owe to plaintiff and class members the highest obligations of good faith, fair dealing, and full disclosure.

9. Defendant Equitec Income Real Estate Investors B is a limited partnership organized and existing under California law with its principal place business in San Mateo County. Equitec B is named as a nominal defendant only.

10. Equitec Income Real Estate Investors C is a limited partnership organized and existing under California law with its principal place of business in San Mateo, California. Equitec C is named as a nominal defendant only.

11. Equitec Income Real Estate Investors—Equity Fund 4 is a limited partnership organized and existing under California law with its principal place of business in San Mateo, California. Equitec 4 is named as a nominal defendant only.

12. Equitec Mortgage Investors Fund IV is a limited partnership organized and existing under California law with its principal place of business in San Mateo, California. Equitec Mortgage IV is named as a nominal defendant only.

13. Equitec 79 Real Estate Investors is a limited partnership organized and existing under California law with its principal place of business in San Mateo, California. Equitec 79 is named as a nominal defendant only.

14. Outlook Properties Fund IV is a limited partnership organized and existing under California law with its principal place of business in San Mateo, California. Outlook IV is named as a nominal defendant only.

15. Glenborough All Suite Hotels, L.P. is a limited partnership organized and existing under California law with its principal place of business in San Mateo, California. All Suites is named as a nominal defendant only.

16. Glenborough Pension Investors is a limited partnership organized and existing under California law with its principal place of business in San Mateo, California. GPI is named as a nominal defendant only.

17. Each of the Partnerships is managed, directed and controlled, either directly or indirectly, by Defendants GRC, GC and Batinovich. No allegations of wrongdoing are made as against the Partnerships, other than those actions perpetrated by the General Partner Defendants. The Partnerships are named as nominal defendants as their absence from the action might interfere with the ability of the Court to grant complete relief to Plaintiff and the Class.

18. Glenborough Realty Trust Incorporated is a corporation organized and existing under Maryland law with its principal place of business in San Mateo, California. GRTI is the entity into which the partnerships will be rolled up pursuant to the General Partner Defendants' unlawful plan and scheme, and it is intended to qualify, post Roll-Up, as a real estate investment trust under Section 856 et seq. of the Internal Revenue Code. GRTI is named as a nominal defendant to assure that the Court may grant complete relief to Plaintiff and the Class.

CLASS ACTION ALLEGATIONS

19. Plaintiff brings this action as a class action on his own behalf and on behalf of a class composed of all holders of units of the Limited Partnerships (the "Class"), who have suffered and will suffer harm as a direct result of the defendants' proposed Roll-Up scheme. Expressly excluded from the Class are defendants and each of their family members, affiliates, subsidiaries, officers, and directors.

20. The Class is so numerous that joinder of all members is impracticable. There are approximately 13,263 unitholders in the Limited Partnerships.

21. Common questions of law and fact exist as to all members of the Class and predominate over any questions affecting solely individual members of the Class including:

a. Whether the General Partner Defendants have breached their fiduciary duties by engaging in a scheme to transfer substantial ownership benefits in the assets of the Limited Partnerships by means of the Roll-Up scheme, which is being implemented on unfair terms and in a coercive manner;

b. Whether the General Partner Defendants are furthering their RollUp scheme by engaging in fraudulent, deceptive, or manipulative acts and practices;

c. Whether the prospectus and consent solicitation statement to be issued in connection with the Roll-Up of the eight Limited Partnerships contains false or misleading statements, misrepresents material facts, or omits to state material facts required to be included therein;

d. Whether plaintiff and other members of the Class will be irreparably harmed if the defendants are not preliminary and permanently enjoined from the conduct described herein; and

e. Whether plaintiff and members of the Class have suffered and will continue to suffer damages as a result of the acts and omissions complained of herein.

22. Plaintiff's claims are typical of all members of the Class. The rights of all unitholders are similarly threatened by the defendants' attempt to unfairly shift ownership rights in over 20% of the Partnerships' assets to themselves. Plaintiff's claims, as an investor in one of the Limited Partnerships, and the claims of all Class members all arise from the same breach of fiduciary duties and are based on identical legal theories. Plaintiff and the members of the Class are being damaged in identical proportions based on the disproportionate ownership

rights which defendants have awarded themselves in the entity which will survive the Roll-Up.

23. Plaintiff is prepared to represent the interests of the Class members vigorously and has retained counsel experienced in similar litigation. No conflict exists between the interests of plaintiff and the interests of the Class. Plaintiff and the other Class members are all unitholders in the Limited Partnerships. Plaintiff and all of the Class members are being harmed by the acts of the defendants as herein alleged.

24. A class action is the most fair and efficient manner in which to adjudicate unitholders' claims arising out of defendants' conduct in connection with the proposed Roll-Up. Defendants have acted and refused to act on grounds generally applicable to the Class, which makes final injunctive relief appropriate on behalf of all Class members. In addition, the prosecution of separate actions by individual members of the Class would create a risk of inconsistent or varying adjudications with respect to individual members of the Class which would establish incompatible standards of conduct for the party opposing the Class, would create a risk of inconsistent rulings which might be dispositive of the interests of other Class members not parties to the adjudications, or which might substantially impede their ability to protect their interests. Further, the amount of individual damages suffered by each member of the Class, while significant in terms of the amounts of their investments, would not be sufficient to justify the expense of separate, individual actions. Should individual actions be brought, or be required to be brought, by each individual member of the Class, the resultant multiplicity of law suits would cause undue hardship and expense for the Court and the litigants.

25. Each of the defendants is based in San Mateo, California, and Plaintiff believes that much of the conduct which is at issue in this litigation was conceived, planned and carried out in this County. Consequently, it is desirable that the litigation of the claims of plaintiff and members of the Class be

concentrated in this Court. Plaintiff anticipates no difficulties in managing this case as a class action.

FACTUAL ALLEGATIONS
THE LIMITED PARTNERSHIPS' INITIAL ORGANIZATION

26. The Limited Partnerships were organized under California law during the period from 1979 through 1988 as real estate limited partnerships. Each of them offered and sold units of limited partnership interest to the public pursuant to prospectuses and registration statements that stated to prospective Limited Partnership investors, among other things, that the Limited Partnerships were formed to invest in income producing real property and/or mortgages. In general, the Limited Partnerships' original investment objectives were to acquire and operate real estate income properties, to preserve Partnership capital and provide cash distributions from operations to investors, while providing the potential for capital appreciation and increasing cash distributions through the ownership and eventual disposition of real estate. The Limited Partnerships were not publicly traded entities, and it was expected that the interests which the investors purchased would be held until liquidation and dissolution after three to twelve years, as provided in the limited partnership agreements of the Limited Partnerships.

27. Each of the Limited Partnerships is governed by a separate Agreement of Limited Partnership. These amended agreements (collectively, the "Partnership Agreements") have substantially uniform terms and requirements concerning the business, structure, and management of the Limited Partnerships.

GENERAL PARTNER COMPENSATION UNDER THE PARTNERSHIP AGREEMENTS

28. The Partnership Agreements spell out and limit the compensation to be paid to the General Partner Defendants. Each one provides for the General Partners to receive: (i) certain ongoing compensation for operating the Partnership, (ii) fixed shares of operating distributions from cash flow, and (iii) a "back-end" share of liquidating distributions -generally 1% until the limited partners have received back their uninvested capital plus a specified 10-16% return, with a General Partner bonus thereafter. (Registration Statement on Form S-4 Pre-Effective Amendment No. 2 at 20; id. at Exhibits 3.07, 3.11, 3.15, 3.18, 3.24, 3.26 and 3.28).

29. Based upon current values of the Limited Partnerships' real estate assets, a liquidation sale of the Partnerships' properties would produce only $2.9 million for the General Partners—$1.4 million in sales fees and $1.5 million in general partner proceeds. (Registration Statement on Form S-4 Pre-Effective Amendment No. 2 at 49). Additionally, a liquidation of the Limited Partnerships would end the substantial management fees presently being charged to the Partnerships.

30. As a consequence, the General Partner Defendants entered into a plan and scheme to effectuate the Roll-Up in violation of their fiduciary duties to Plaintiff and the Class, as well as their duty of good faith and fair dealing. In order to perpetuate their lucrative management position and to obtain a substantial equity interest of over 20 million dollars, defendants embarked upon their Roll-Up scheme.

THE ROLL-UP

31. The present terms of the Roll-Up are memorialized in a Registration Statement on Form S-4, filed with the Securities and Exchange Commission on or about September 1, 1994

bearing Registration No. 33-83506, which has been amended thereafter on September 12, 1994 and January 4, 1995. The January 4, 1995 Pre-Effective Amendment No. 2 is sometimes referred to in this complaint as the "S-4." The S-4 contains the current draft of the prospectus and consent solicitation statement which is to be issued by the General Partner Defendants to members of the Class to obtain their consent to the Roll-Up. According to the S-4, the Partnerships raised over $153 million in capital contributions from investors. Through September 30, 1994, total distributions to the Partnerships totaled only $77,843,615, approximately 1/2 of the initial investments. Indeed, Partners in only one of the Partnerships (Equitec 79) had received distributions which exceeded their original invested capital. These losses will be exacerbated if the Roll-Up is effectuated on the terms defendants presently propose.

32. If the Roll-Up is completed, the Limited Partnerships will be combined with GC and merged into GRTI. The separate existence of the Partnerships will cease, and GRTI will control the assets of the Partnerships through an affiliated partnership known as the Operating Partnership. Plaintiff and Class members will receive shares of common stock or notes issued by GRTI. At the heart of defendants' deceptive and improper scheme lies their decision to contribute GC to the Roll-Up in exchange for an excessively large ownership interest in the resulting entity, GRTI.

33. Through the Roll-Up, defendants will convert their ownership of a worthless management company, with a book value of negative $5.4 million ($3.9 million in assets subject to $9.3 million in debt), into a 22-28% interest in GRTI (valued at $21- $28 million) and a profit for defendants. Further, the Roll-Up will prevent the Limited Partnerships from selling their assets for their own profit, and incur (at the Partnerships' sole expense) tremendous and excessive fees, further reducing the assets accruing to the interest of Plaintiff and the other Class members.

34. A total of 6,871,615 shares in GRTI are to issued if all Partnerships participate in the Roll-Up. Of this a total of 1,610,912 shares will be allocated to the owners of GC assuming the Roll-Up is effectuated. S-4 at 93-94.

35. Specifically, the S-4 identifies three levels of allocation of interests in GRTI. S-4 at 76. The Level One allocation is between the Partnerships as a group and GC. The Level Two allocation is among the Partnerships. The Level Three allocation is between the General Partners and the limited partners of each Partnership.

36. In making the Level Two allocation, the defendants obtained separate appraisals of the real estate values held by each of the eight Limited Partnerships. However, the Level One allocation arbitrarily allocated 20-24% of GRTI to GC (which is affiliated with the other General Partner Defendants) without any appraisal of GC's business or assets. Instead, allocation at Level One was accomplished pursuant to a different methodology which focused upon the relative cash flow of GC on the one hand, and the Partnerships on the other. This was done because GC, unlike the Partnerships, was technically insolvent, with a negative networth of $5.4 million..

37. According to the S-4, the Limited Partnerships have a value of $82.2 million. Allocating GC a 20.24% share of this appraised value would correspond to a $103.06 million total value of GRTI and a valuation of GC interests at over $20.86 million.

38. This $20 million valuation for the GC interests constitutes an outrageously unfair and excessive valuation for the following reasons:

a. The Book Value of GC is substantially negative; GC has assets of only $3.9 million, less $9.3 million in debt obligations which will be taken over by GRTI.

b. The $20 million valuation constitutes the application of a multiplier of more than 7 times GC's most recent

net earnings without reduction for its substantial debt obligations that will be relieved in the Roll-Up.

c. With no appraisal at all, the GRC/GC management group has been arbitrarily assigned a 20.24% share of GRTI plus its General Partners' share of each Limited Partnership as if each Partnership had been liquidated.

d. The General Partners' share of the eight Partnerships amounts to 22,421 additional shares and would bring GRC/GC's total ownership to 1,413,236 shares or 20.56% of GRTI's 6,871,615 total shares. When added to the allocation of 197,676 shares attributable to GRC/GC's ownership of Limited Partnership interests, GRC/GC's resulting total will be 1,610,912 shares or 23.44% of GRTI. Depending upon the number of Partnerships which elect to participate, as well as other factors, the allocation to the General Partner Defendants may exceed 27% of GRTI's shares.

39. In order to finalize the Roll-Up scheme pursuant to the terms of the current Partnership Agreements, the defendants need to receive the approval of a majority of the limited partners in each Limited Partnership. Any Limited Partnership that fails to approve the Roll-Up by not providing a majority vote in favor will not be included in the Roll-Up and will remain an independent partnership entity. Any Limited Partnership that does approve the Roll-Up will exchange all of its outstanding limited partnership units for newly issued shares and notes. The proposed solicitation materials for that vote are deceptive and misleading as more fully described below.

THE NOTES AS AN ALTERNATIVE TO APPRAISAL RIGHTS UNDER THOMPSON-KILLEA ACT

40. Purporting to satisfy the provisions of California's Thompson-Killea Limited Partner Protection Act of 1992, the defendants have structured the Roll-Up to permit investors to elect to receive up to 20% of the total Exchange Value in the form of subordinated, unsecured Notes due in the year 2002

(the "Notes") instead of GRTI shares. But the interest rate on the Notes (120% of the federal 3 year note rate) is so low for the risk involved that the Notes are certain to sell, if at all, at a substantial discount from their face/exchange value.

41. Under the Thompson-Killea Limited Partner Protection Act of 1992, certain presumptions relating to the fairness of roll-up transactions are created under California law. While the S-4 states that the Roll-Up is intended to comply with Thompson-Killea, that statement is false and misleading, and is designed to foster the incorrect impression among Class members that their rights are being duly protected in the context of the Roll-Up.

42. Under Thompson-Killea, a presumption is created that the rights of limited partners are protected in a roll-up transaction if the transaction provides that a dissenting limited partner will receive compensation for his, her, or its limited partnership units based on an appraisal of the limited partnership assets performed by an independent appraiser unaffiliated with the sponsor or general partner of the limited partnership and which values the assets as if sold in a orderly manner in a reasonable period of time, plus or minus other balance sheet items, less the costs of sale or refinancing. Compensation on account of such appraised value to be given to dissenting limited partners in a roll-up transaction may be in the form of cash, secured debt instruments, unsecured debt instruments, or freely traded securities. However, to fall within the statutory presumption of fairness, debt instruments or freely tradable securities must meet certain specified requirements.

43. The Roll-Up fails to fall within the statutory presumption of fairness established under Thompson-Killea because the allocation mechanism employed in the context of the Roll-Up does not assure that dissenting limited partners will receive the appraised value of their pro rata share of the limited partnership assets plus or minus other balance sheet items and less the cost of sale or refinancing. Instead, pursuant to the terms of the Roll-Up as described in the S-4, dissenting limited

partners will receive far less. This is a function of both the allocation of shares to GC pursuant to the terms of the Roll-Up, as well as the fact that the total amount of Notes available to be issued under the Roll-Up is limited. If there are a sufficient number of dissenting limited partners, it is possible that there will not be sufficient Notes for all dissenting limited partners.

44. Moreover, dissenting limited partners who fail to make an effective election to receive Notes will, instead, receive shares in GRTI. However, in view of the fact that the GRTI shares have not traded on a certified national securities Exchange or on the interdealer quotation system of the National Association of Securities Dealers, Inc. for one year, the shares of GRTI do not qualify as freely tradeable securities under Thompson-Killea.

BREACH OF DUTY TO MAXIMIZE VALUE

45. Under well-established fiduciary law, management that has decided to acquire an entity's businesses or assets for itself must first seek to obtain maximum value by seeking to auction or otherwise sell those businesses or assets to the highest bidder, without imposing obstacles to preserve management's position or purchase opportunity. The General Partner Defendants breached this duty by entering into the Roll-Up scheme without making any effort to market the properties of the Partnerships.

FUNDAMENTAL UNFAIRNESS OF THE ROLL-UP

46. The defendants' Roll-Up plan is unfair and coercive for at least the following reasons:

a. Plaintiff and Class members are being compelled to vote in favor of forfeiting ownership of their existing securities in defined, finite-life real estate limited partnership entities in exchange for units of a newly-

created, publicly traded corporation with no definite composition and, thus, no definable asset value, net worth, earnings, cash flow, or liquidation value on which to base their investment decision.

b. Plaintiff and Class members are precluded from receiving objective investment advice from the General Partners regarding their voting decisions on the Roll-Up, because General Partners and the individual defendants are receiving substantial compensation as a result of the Roll-Up, while their continued receipt of compensation may be of limited duration otherwise.

c. The voting process forces those limited partners who vote against the Roll-Up, but whose Limited Partnerships approve the Roll-Up, to become shareholders and/or noteholders of GRTI against their will.

d. The proposed prospectus and consent solicitation statement fails to disclose any valuation data which would permit Class members to make an informed assessment of the allocation of GRTI shares to the General Partners Defendants and their affiliates, and falsely states that the Roll-Up complies with the requirements of the Thompson-Killea Limited Partner Protection Act of 1992.

e. The Roll-Up provides for an excessive and unfair allocation of GRTI shares to the General Partner Defendants.

f. The Roll-Up is the product of self-dealing by the General Partner Defendants.

47. In the event that the Roll-Up is consummated, plaintiff and Class members will be irreparably damaged in that they will have lost their interests in the Limited partnerships in exchange for units in GRTI.

FIRST CAUSE OF ACTION
(Claim for Breach of Fiduciary Duty
Against GC, GRC and Batinovich)

48. Plaintiff incorporates by reference and repeats and realleges Paragraphs 1 through 47 above, as if fully set forth herein.

49. The General Partner Defendants, by reason of their position as general partners of the Limited Partnerships, are in a fiduciary relationship with plaintiff and Class members and owe plaintiff and Class members the highest obligations of good faith, fair dealing, and full disclosure.

50. Defendants breached their fiduciary duties to plaintiff and Class members by jointly orchestrating the Roll-Up scheme in order to convey economic benefits to the defendants, in the form of a $20 million interest in GRTI, in return for a technically insolvent entity using unfair terms and coercion, and with the intent to disseminate a false and misleading prospectus/consent solicitation statement.

51. The proposed Roll-Up is not in the best interests of plaintiff and Class members. The Roll-Up is a violation of the defendants' obligation to direct the affairs of the Limited Partnerships in good faith for the investors and not for purposes of self-dealing and taking unfair advantage of said investors.

52. The conduct of each of the defendants as herein alleged was undertaken deliberately, willfully, and in conscious disregard of the rights of plaintiff and Class members and was intended and directed to harm the Limited Partnerships and their limited partners and to advance the personal interests of the General Partner Defendants in violation of the fiduciary duties that each of said defendants owes to plaintiff and the Class members.

53. Plaintiff and Class members have no adequate remedy at law. if defendants are not enjoined from consummating the

Roll-Up, plaintiff and the Class members will suffer irreparable injury.

SECOND CAUSE OF ACTION
(Claim for Breach of Duty of Good Faith and Fair Dealing Against GC, GRC and Batinovich)

54. Plaintiff incorporates by reference and repeats and realleges Paragraphs 1 through 53 above, as if fully set forth herein.

55. Plaintiff and the other Class members held a reasonable expectation that defendants would act to maximize their interests and subordinate any incentive-based return to the General Partners until the unitholders realized a full return on their capital contribution plus growth, as represented in the original Partnership Agreements to which the General Partner Defendants voluntarily became bound on the dates alleged above. By voluntarily assuming the duties and status of a general partner in the Partnerships under the Partnership Agreements, the General Partner Defendants became subject to an implied covenant of good faith and fair dealing which barred them from taking actions that would prevent Plaintiff and the Class members from receiving the benefits of the Partnership Agreements.

56. Defendants' attempt to effect the Roll-Up, to subvert bona fide dissenters' appraisal rights by the use of coercive low-interest notes, and to dilute the value of unitholders' interests in the Partnerships through both the excessive valuation of GC and the payment of excessive fees associated with the Roll-Up constitute an obvious departure from the standards of good faith and fair dealing imposed upon defendants under California law and the Partnership Agreements.

57. Defendants' conduct substantially defeats the reasonable expectations of the Class in committing their capital to the Limited Partnerships at their inception and utilizes defendants' exclusive control and superior position to oppress

the unitholders, to commit fraud upon their fights, and to deprive the unitholders of the benefits of their investment.

58. Defendants' oppressive behavior threatens to prejudice the rights and interests of the members of the Class and would deprive Class members of a substantial financial benefit that would otherwise accrue to them.

59. Plaintiff and the Class members have no adequate remedy at law. If defendants are not enjoined from consummating the Roll-Up, plaintiff and the Class members will suffer irreparable injury.

IRREPARABLE INJURY

60. As a result of the foregoing conduct on the part of the defendants, plaintiff and the members of the Class have sustained and will continue to sustain irreparable injury in the absence of action by this Court. As described in greater detail above, unless this Court assumes equitable jurisdiction and otherwise orders the Defendants to act in accordance with their fiduciary obligations and other duties under California law, they will continue to act in accordance with their coercive and improper scheme in breach of their fiduciary duties and their duty of good faith and fair dealing. Plaintiff and the Class lack an adequate remedy at law.

PRAYER FOR RELIEF

WHEREFORE, plaintiff, individually and on behalf of the members of the Class, demands the following relief:

A. An Order certifying this action as a class action on behalf of the proposed plaintiff Class (i.e. all unitholders in the affected Limited Partnerships excluding defendants and their affiliates);

B. A declaration that the defendants have breached their legal duties to limited partners of the Limited Partnerships;

C. An Order preliminarily and permanently enjoining Defendants from effectuating the Roll-Up of the Limited Partnerships, and, if consummated, rescinding the RollUp and setting it aside except based on a fair and independent valuation of the GC assets;

D. An Order requiring defendants to account for all profits realized from their improper conduct challenged herein;

E. An Order awarding compensatory damages in an amount to be determined upon proof submitted to the Court;

F. An award of costs and disbursements of this action, reasonable attorneys, fees and expenses, and such other and further relief as the Court may deem just and appropriate.

Dated: February 20, 1995 Respectfully submitted,

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR SAN MATEO COUNTY

ANTHONY E. BLUMBERG, on behalf of himself and all others similarly situated, *Plaintiff,* v. GLENBOROUGH REALTY CORPORATION (A CALIFORNIA CORPORATION); GLENBOROUGH CORPORATION (A) CALIFORNIA CORPORATION); and ROBERT BATINOVICH, *Defendants,* EQUITEC INCOME REAL ESTATE INVESTORS B, et al., *Nominal Defendants.*	) CASE NO. 391223) CLASS ACTION)))))) DECLARATION OF) CLINTON A. KRISLOV) IN SUPPORT OF) REQUEST FOR FINAL) APPROVAL OF CLASS) ACTION SETTLEMENT) AND PETITION FOR) AN AWARD OF) ATTORNEY'S FEES) AND EXPENSES) Date: December 21, 1995) Time: 9:00 a.m.) Dept.: 4) Trial: None) Disc. cut-off: None)

I, Clinton A. Krislov, declare:

1. I am an attorney-at-law, duly admitted to practice in the State of Illinois. I am the founder and principal of the law firm of Krislov & Associates, Ltd. I am submitting this Affidavit in support of my firm's application for an award of attorneys, fees in connection with services rendered to the plaintiff class and the reimbursement of expenses incurred by my firm in the course of this litigation.

2. I personally handled all negotiations with the defendants concerning class counsel's application for an award of attorney's fees and expenses. All discussions concerning attorney's fees were entirely independent of the settlement negotiations and occurred *only after* we had reached a final agreement on all of the substantive terms of the settlement.

3. I began monitoring this proposed rollup with the first S.E.C. filing on September 1, 1994. I have particular experience in successfully identifying and challenging unfair rollup transactions. *See, e.g., In re Prudential-Bache Energy Income Partnerships Securities Litigation*, No. MDL 888 (E.D. La. 1994); *In Re Franchise Finance Corp., of America Litigation*, C.A. No. 13073 (Del. Ch. 1994). I identified three areas in which the original proposal and filings were deficient: first, the allocation of interests between the general partner/ management group and the limited partners was disproportionate; second, there was not full disclosure of the risks that were peculiar to this transaction; and third, there were not significant protections against an immediate decline in the market value of the resulting entity after the rollup.

4. After having identified these problem areas in the original registration statement, I engaged an outside expert consultant to study the financial aspects of the transaction in greater depth and to review the transaction as it progressed. Our expert continued to study the proposed transaction after we filed suit in February 1995. When we filed suit, our primary orientation was to challenge the Level one allocations (i.e., maximizing the

shares allocable to the partnerships), to the supplement the risk disclosures of the transaction to the limited partners, and to achieve as much protection an possible for the post-rollup market value of the shares received. Thus, when Glenborough Corp.'s Level one allocation percentage did not change after the addition of the Rancon management contracts, which increased Glenborough Corp.'s contribution to cash flow by over 50%, we determined that the rollup was within the range of reasonableness with respect to that aspect of the deal. We then proceeded to negotiate the additional disclosures and the protective aspects of the terms of the rollup which help ensure the market strength of the shares following the rollup.

5. By the end of June 1995, we were able to negotiate a settlement on all of the substantive text, and a settlement agreement was drafted and circulated. *Only then* did we begin to negotiate the attorney's fees issues at all. When we reached an impasse on this issue, we sought ways to surmount the impasse. After examining various alternatives, Mel Goldman and I agreed to meet on September 6, 1995, at the new Denver International Airport, to discuss and resolve any open issues. Only after assuring ourselves that we had agreed on all substantive terms, did we then begin negotiations over fees and were, after some hours, able to reach agreement on the figure ultimately agreed upon.

I declare under the penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed at Chicago, Illinois on December 18, 1995.

/s/ CLINTON A. KRISLOV

Clinton A. Krislov

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 633 West Fifth Street, Suite 3300, Los Angeles, California 90071.

On December 18, 1995, 1 served the foregoing document described as **DECLARATION OF CLINTON A. KRISLOV IN SUPPORT OF REQUEST FOR A FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND PETITION FOR AN AWARD OF ATTORNEY'S FEES AND EXPENSES** on the parties in this action, as follows:

X By placing the true copies thereof enclosed in sealed envelopes addressed as stated on the attached service list;

SEE SERVICE LIST

XX By Mail: I caused such envelope to be deposited in the mail at Los Angeles, California. The envelope was mailed with postage thereon fully prepaid.

By Facsimile: I caused such document(s) to be sent to the address above via the facsimile number indicated.

By Personal Service as indicated: I caused such envelope to be delivered by hand to the offices of the addressee.

XX By Federal Express: I caused such document(s) to be sent Federal Express next day delivery an stated on the attached service list.

XX (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

I am "readily familiar" with the firm's practice of collecting and processing correspondence for mailing. It is deposited with the U.S. Postal Service on that same day in the ordinary course of business. I as aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than I day after the date of deposit for mailing in affidavit.

Executed on December 19, 1995 at Los Angeles, California.

/s/ Laura Sesti

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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF SAN MATEO

ANTHONY BLUMBERG et al., *Plaintiffs,* v. GLENBOROUGH REALTY CORPORATION, GLENBOROUGH CORPORATION, ROBERT BATINOVICH et al., *Defendant.*	) Case No. 391223)) OBJECTION OF) CLASS MEMBERS) DONALD A.) BARNET, SHEILA) GOLD, RONDA) CHANEY, LON) CHANEY, JR.,) WILLIAM P.) MITHCELL AND) ROBERT Q.) BUICKEROOD,) TRUSTEE, TO) FINAL APPROVAL) OF SETTLEMENT)) Date: December 21,) 1995) Time: 9:00 a.m.) Dept.: 99)

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I. INTRODUCTION

Class members Members Donald A. Barnett, Sheila Gold, Ronda Chaney, Lon Chaney, Jr., William P. Mitchell and Robert Q. Buickerood hereby file this obection to the final approval of the proposed settlement of this class action. This action arises out of a proposed consolidation of eight real estate limited partnerships[1] into Glenborough Realty Trust Incorporated, a publicly-traded real estate investment trust, or "REIT" (the "REIT"). Under the terms of the Consolidation, the limited partners of the Partnerships are to surrender their interests in the Partnerships in exhange for shares of common stock in the REIT. Defendants Robert Batinovich ("Batinovich") and Glenborough Realty Corporation, who are the general partners of the Partnerships (collectively, "the General Partners"), will also receive shares of common stock in the REIT in exchange for contributing to it (1) Glenborough Corporation ("GC"), a management company controlled by Batinovich, (2) assorted other businesses and interests, and (3) their general partnership interests in the Partnership. The Consolidation is of a type commonly referred to as a "rollup", and is hereinafter referred to as the "Rollup" or the "Rollup Transaction".[2]

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(1) These are Equitec Income Real Estate Investors B, Equitec Income Real Estate Investors C, Equitec Income Real Estate Investors—Equity Fund IV, Equitec Mortgage Investors Fund IV, Equitec 79 Real Estate Investors, Outlook Properties Fund IV, Glenborough All Suite Hotels, L.P., and Glenborough Pension Investors (collectively, "the Partnerships").

(2) 'Rollups" have been extensively criticized on the ground that they almost always benefit and enrich the general partners at the expense of the limited partners. *See, e.g.*, John Geschke, *Regulating Rollups: General Partners' Fiduciary Obligations in Light of the Limited Partnership Rollup Reform Act of 1993*, 47 Stan.L.Rev. 85 (1994). Indeed, perceived abuses by general partners in effectuating such transactions led to both federal and state legislation to prevent further abuse. See Limited Partnership Rollup Reform Act of 1993 (15 U.S.C. §78n(h) *et seq.*; Killea-Thompson Act (Cal. Corp. Code §25014.5 *et seq.*)

The Class Action Complaint (the "Complaint"), which purported to have been brought by plaintiff Anthony Blumberg as a class action on behalf of all limited partners in the Partnerships, alleged that the Rollup is unfair to the limited partners in that, *inter alia*, (1) the Consolidation was designed to perpetuate the General Partners' ability to earn management fees and other consideration (Complaint at ¶¶28—30; 46), (2) the Consolidation would prevent the limited partners from realizing value on the sale of the Partnerships' assets (*id.* at ¶33); and (3) the shares of common stock of the Company to be issued to the General Partners are excessive and disproportionate (*id.* at ¶¶32-33; 38; 46). The Complaint alleged two causes of action, *i.e.*, for breach of fiduciary duty and breach of the duty of good faith and fair dealing, and sought to enjoin the Consolidation.

However, barely four months after the Complaint was filed—and without having conducted any formal discovery, without having sought preliminary or final injunctive relief against defendants, and, indeed, without even having required defendants to respond to the Complaint—plaintiff Blumberg agreed to settle the litigation in its entirety. Significantly, this settlement encompasses not only plaintiff Blumberg's individual claims, but also those of a plaintiff class consisting of all of the 13,000 persons who hold limited partnership interests in any of the Partnerships. Moreover, despite the fact that focus of the original Complaint was for injunctive relief—*i.e.*, to prevent the Consolidation—, the settlement purports to conclusively settle, release and bar any and all claims (including claims for damages) which the class members may have relating to this $96 million transaction, without affording the class members any right to "opt-out" or exclude themselves from the class. Finally, even though no person or entity other than the named defendants are parties to the settlement (or in any way involved in the litigation), the scope of the claims settled, released, and barred extends not only to the named defendants and their affiliates, but rather to any and all persons. Thus, the settlement extinguishes *all* claims—of any kind or nature—which *any*

limited partner might have against *any* person concerning the Rollup.

More important, this "settlement" confers no meaningful benefit on the members of the plaintiff class. Despite purporting to settle, release and permanently bar any and all claims for money damages or equitable relief (such as rescission), the settlement does not require defendants to pay *one dime* to the plaintiff class. Similarly, the settlement does not increase by *one share* the allocation of common stock to be received by the limited partners in connection with the Rollup. Rather, the settlement merely requires defendants to add four "curative disclosures" —totalling some *eight sentences*—to the five hundred (500) page Prospectus, modifies one purported "restriction" on defendants' ability to sell stock after the Rollup, and limits the Company's ability to grant stock options to *employees*. These "benefits" are totally insignificant.

With respect to the plaintiff Blumberg and his counsel, however, the settlement does provide very substantial—and tangible—benefits. According to the terms of the settlement, plaintiff Blumberg is entitled to seek an "incentive bonus" of $10,000, and his counsel is entitled to seek attorneys' fees in the amount of *eight hundred and fifty thousand dollars*! Even worse, the bonus and the fees will not be paid by the defendants, but rather by the REIT—an entity which will not have economic substance unless and until the Rollup is approved. Thus, plaintiff and his counsel are not only no longer opposed to the Rollup, they have become, in effect, advocates for that transaction! Consequently, apart from its other problems, the settlement creates a direct, substantial, and irreconciliable conflict of interest between plaintiff and his counsel, on one hand, and the class members, on the other.

While this settlement would be objectionable under virtually any circumstances, it is especially so here, where the claims of the class members against the General Partners are extremely strong. As explained below, the Rollup is (as the Complaint in this matter originally alleged) grossly unfair to the

limited partners in that, *inter alia*, (1) as a result of the change in the structure of the limited partners' investment, *i.e.*, from a limited partnership to a corporation, the limited partners will lose numerous important rights and investment benefits, including the right to a preferred return on investment (the current accumulated value of which is some $63 million), (2) the limited partners' ownership interests will be substantially diluted as a result of an excessive and improper allocation of shares of common stock to the General Partners, and (3) the limited partners will incur millions of dollars in transaction costs alone—as well as suffer adverse tax consequences—without any corresponding benefit. At the same time, the Rollup will result in substantial benefits to the General Partners, including (1) tax benefits (not shared by the limited partners) of approximately $19 million, (2) relief from approximately $14.3 million of debt of GC, (3) elimination of at least approximately $4.3 million of liability to the limited partners, and (4) an allocation of common stock in the Company which is excessive and disproportionate to the interests being contributed by the General Partners (and others). Thus, it is clear that the Rollup amounts to a clear breach of the fiduciary (and other) duties owed by the General Partners to the 'limited partners of the Partnerships.

In short, this settlement constitutes a complete abandonment of the rights of the class members in exchange for substantial attorneys' fees. Under the legal—and equitable—principles which govern this Court's review of the settlement, the settlement cannot—and must not—be allowed to stand. Therefore, the motion for final approval of the settlement must be denied.

II. THE NATURE OF THE CLAIMS WHICH WOULD BE RELEASED IF THE SETTLEMENT WERE TO BE APPROVED BY THIS COURT

To evaluate the merits of the settlement, the Court must consider the nature of the claims which would be released and extinguished if the settlement were to be approved. Those

claims which include, without limitation, claims that the Rollup Transaction is unfair to the limited partners of the Partnerships, and that the defendants have misled the limited partners in attempting to induce them to vote in favor of the Rollup, are serious, substantial and supported by clear and compelling evidence.

A. The Rollup Transaction Is Grossly Unfair to the Limited Partners

The Rollup Transaction, as described in the Prospectus,[3] is grossly unfair to the limited partners in several respects.

1. Too Much Stock In The REIT Has Been Allocated To The General Partners And Their Affiliates, So As To Unfairly Dilute The Limited Partners' Ownership Interests

The Rollup is unfair, first, because it allocates an excessive amount of stock in the REIT to the General Partners and entities controlled by them, thus unfairly diluting the limited partners' share and giving a windfall to the General Partners. That allocation has been carried out pursuant to a faulty and biased methodology which violates every principle of fairness and equity.

The REIT, as described in the Prospectus, will consist basically of two kinds of assets—commercial and industrial real estate, which is being contributed by the Partnerships and related entities (hereinafter, the "Allocation Partnerships"), and a management company, GC, which is substantially owned or controlled by the General Partners. The real estate which the Allocation Partnerships are contributing to the REIT generates income from rents, and also has a substantial underlying value in that it can be sold on the open market. GC, on the other hand, is a service business. It generates income by performing property management services, and does not own significant or

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(3) A copy of the Prospectus, in its entirety, is attached to the Declaration of Alan R. Plutzik, filed herewith, as Exhibit A.

valuable fixed assets. GC's future prospects are dependent on the extent to which it can count on a continuing flow of management fees from the Partnerships and other entities. Any reduction in such fee income—such as might result if one or more of the Partnerships liquidated its assets and distributed the proceeds to its limited partners—would cause a direct and material diminution of GC's bottom line.

The General Partners have allocated the REIT's stock between the Allocation Partnerships and the shareholders of GC (*i.e.*, themselves and their affiliated persons and entities) so as to give the GC shareholders a disproportionate share of the stock. They have allocated approximately 5.15 million shares, or 79.76% of the REIT's stock, to the Allocation Partnerships, and approximately 1.3 million shares, or 20.24% of the stock, to the shareholders of GC.[4] If we exclude from the calculation certain of the Allocation Partnerships which are themselves owned or controlled by the General Partners, the division of stock between the remaining Partnerships and the shareholders of GC is in the ratio of 78% to 22%. In other words, for every 3.5 shares allocated to the limited partners, the GC shareholders will receive one share. *Id. See* the Declaration of valuation expert Robert F. Reilly, filed herewith (the "Reilly Declaration"), at ¶2. This division presupposes that the value of GC is 29% (.22/.78) of the value of the real estate assets contributed to the deal by the Partnerships. *Id.*

The General Partners have themselves suggested that the real estate assets contributed to the REIT by the Partnerships are worth between $65 and $76 million.[5] Thus, to justify giving the shareholders of GC as much as 29% of the REIT stock which the investors in the Partnerships will receive, the value of GC would have to be between $18 million and $22 million.

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(4) *See* Prospectus, Exhibit A to the Plutzik Declaration, at page 11.

(5) *See* Prospectus at 86,113 and 268; Prospectus Supplement (hereinafter cited as "Supplement"), at 25, 60, 84, 105, 127, 151, 175, 201. Relevant excerpts from the Supplement are attached collectively as Exhibit B to the Plutzik Declaration.

However, the General Partners made no effort whatsoever to determine the value of GC. (Had they done so, they would have had to conclude that the value of GC is far less than $18 million.) Rather, the General Partners allocated the REIT stock between the limited partners and the GC shareholders solely by comparing the cash flow of GC with the aggregate cash flow of the Partnerships.

As the Reilly Declaration convincingly demonstrates, the General Partners' methodology of allocating the stock by comparing cash flows is improper and results in the allocation of an excessive amount of stock to the owners of GC—*i.e.*, defendant Batinovich and others. Mr. Reilly, a highly experienced and qualified expert who is a co-author of the definitive treatise on the subject of business valuation,[6] has analyzed the Rollup Transaction and, in particular, the allocation of stock between the Partnerships and the shareholders of GC. He has concluded that the percentage of stock which has been allocated to the shareholders of GC has been unfairly inflated by a factor of *at least* 40% (relative to the Partnerships), and possibly substantially more. Reilly Declaration, ¶13.

The General Partners' allocation methodology violates fundamental valuation principles and produces an unfair result in several distinct respects.

(i) Failure to Allocate in Accordance with the Relative Value of the Assets Contributed to the REIT

Instead of measuring the cash flow of the Allocation Partnerships against the cash flow of GC to determine how to divide the REIT stock, the General Partners should have allocated the stock in accordance with the ratio between the *fair value* of the Allocation Partnership assets and the *fair value* of GC. Reilly Declaration, ¶¶8,11. A comparison of cash flows,

(6) Shannon P. Pratt, Robert F. Reilly and Robert Schweihs, *Valuing a Business* (3d Edition, 1996).

even if properly conducted, is no substitute for a comparison of *values*.

Indeed, the cash flow of one group of business entities, such as the Partnerships, to the cash flow of another business entity engaged in an entirely different business, such as GC, cannot yield a fair allocation because the two figures are simply not comparable—they are apples and oranges. This is so because, for purposes of estimating value, one must consider not only cash flow but also *the risk that the cash flow will be achieved*. The cash flow must then be discounted by that risk to arrive at a fair estimation or comparison of value. Reilly Declaration, ¶¶8-12.

It is a fundamental precept of valuation that risk varies depending on the particular business involved and, especially, on the line of commerce in which the business operates. Reilly Declaration, ¶8. Far greater risk is associated with the income stream of a service company engaged in property management than with the rental income generated by commercial real property. Indeed, the discount rate which must be applied to the cash flow generated by a service company like GC is *at least double* the discount rate applicable to the cash flow earned by the Partnerships' real estate properties. Reilly Declaration, ¶12.

Therefore, even if the cash flow figures on which the General Partners based the stock allocation were otherwise valid (which, as we shall see, they were not), GC's cash flow would nevertheless have to be discounted substantially relative to the cash flow generated by the Partnerships to produce a fair comparison. *Id.* However, in allocating the stock between the limited partners and themselves, the General Partners simply compared cash flow figures and made no allowances at all for risk. As a result, the the General Partners allocated to themselves and their affiliates a far greater percentage of the REIT's stock than they deserved.

(ii) Inappropriate and inconsistent Calculation of Cash Flow

Moreover, for purposes of comparison with the Partnerships' cash flow, the General Partners calculated GC's cash flow in an inappropriate, inconsistent and unfair fashion. Reilly Declaration, ¶¶9- 10

The allocation to the GC shareholders of 29% of the stock which the limited partners will receive was first proposed by the General Partners in Pre-Effective Amendment No. 2 to the Rollup's Registration Statement, which was filed with the Securities and Exchange Commission on January 4, 1995. The cash flow figure used for GC in that allocation was $1.897 million, which was based on budgeted (*i.e., predicted*) results for GC for a single fiscal year—fiscal year ended June 30, 1995.[7] The General Partners continue to base their allocation of the REIT stock on GC's *predicted* fiscal 1995 cash flow. This is improper for two reasons.

First, regardless of whether one uses budgeted numbers or historical financial data in conducting a valuation analysis, that data must be normalized, either by adjusting to exclude extraordinary items or by averaging several years of results, or both. Historical or projected financial data used in a valuation analysis should present a fair picture of the company's actual or projected results, and should not reflect aberrational results of operations for particular years which may not be representative of past or future performance in other years. Reilly Declaration, ¶9. Where the financial results of a company differ significantly from year to year, to use a single year's figure without normalizing it and without considering results from other years produces anomalous and unfair results.

Here, GC's financial results varied widely from year to year during the five years immediately prior to the issuance of

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(7) Pre-Effective Amendment No. 2, at page 94. *See* Exhibit C to the Declaration of Alan R. Plutzik, filed herewith.

the Prospectus.[8] Yet, the GC cash flow figures which formed the basis for the allocation in Pre-Effective Amendment No. 2 were nevertheless based on *a single year's* projected results, and there is no indication that those results were appropriately normalized.

Second, the General Partners have continued to rely on budgeted or projected fiscal 1995 cash flow figures in allocating the REIT stock long after those figures have been superseded and undermined by *actual* fiscal 1995 results. As noted above, the allocation of the stock based on budgeted fiscal 1995 cash flow was first proposed by the General Partners in a document filed in January, 1995. By the time the Prospectus became effective in late October, 1995, GC's 1995 fiscal year had concluded and the *actual* results for that fiscal year were available. Indeed, actual financial results for fiscal 1995 are included in materials mailed to the limited partners to solicit their consent to the Rollup. Yet, the General Partners continue to base their stock allocation on the *previously projected* fiscal 1995 results rather than making use of the actual reported fiscal 1995 numbers that superseded them.

The General Partners' motive in ignoring the actual 1995 numbers becomes clearer when those numbers are scrutinized. While definitive cash flow figures for 1995 cannot be determined from the data which the General Partners have disclosed, it appears that, when normalized to remove extraordinary items, GC's *actual* fiscal 1995 results were significantly less favorable than 1994.[9] The Prospectus's failure

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(8) GC's reported financial results for the years 1991-1995 are found at page 275 of the Prospectus.

(9) GC reported net income of $718,000 in fiscal 1995, down substantially from the $3.1 million in net income reported the previous year. Supplement, at page 7. *See* Exhibit B to the Plutzik Declaration. Moreover, at least $1.7 million of GC's revenues for the 1995 fiscal year were attributable to extraordinary income from the so-called "Rancon Partnerships". If that revenue and associated costs were excluded, it appears that GC's profits for the year would have been reduced by at least $400,000. *Id.*

to make use of, or even discuss, actual fiscal 1995 results raises serious questions about the integrity of the allocation process.

(iii) The General Partners Improperly Relied on "Adjusted" Cash Flow From A Year Whose Were Inflated By Extraordinary Income

Notwithstanding the fact that the allocation of stock between the limited partners and the GC shareholders is based on projected *fiscal 1995* cash flows, the Prospectus repeatedly invokes "adjusted" historical financial results from GC's *1994* fiscal year, which ended June 30, 1994. The Prospectus argues that because the 1994 cash flow figures would justify an even higher allocation of stock to GC's owners than the 29% figure actually awarded, the allocation actually made is reasonable. However, the General Partners' reliance on GC's "adjusted" 1994 cash flow figures does not mitigate the unfairness of the transaction.[10] The evidence shows, and Mr. Reilly has concluded, that reliance on GC's fiscal 1994 "adjusted" cash flow to allocate the stock in the REIT would be inappropriate. Reilly Declaration, ¶¶9-10.

Fiscal 1994 was an aberrational year for GC which is not in any way representative of that company's past performance. In that fiscal year, GC reported the highest revenues, net income and book value of any of the past five years. Prospectus at 275. Indeed, GC's 1994 results exceeded those for other recent years by a very wide margin. *Id.*

Even more importantly, fiscal 1994 results are not indicative of GC's *future* performance. GC's results for fiscal 1995 were substantially worse than the 1994 results—the Company's revenues, profits and book value all plummeted. *Id.* Indeed, the notes to GC's financial statements indicate that GC

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(10) Indeed, as we demonstrate below, the Prospectus's focus on GC's fiscal 1994 adjusted cash flow figures as a justification for the huge quantity of stock being allocated to the GC shareholders is highly misleading. See discussion at pages 17-18, below.

experienced a "decrease in management activities" in fiscal 1995. Supplement at 1 (see Exhibit B to the Plutzik Declaration). Furthermore, there is good reason to believe that unless the Rollup goes forward, GC's performance will decline even more in the future because many of the Partnerships on which GC has been depending for fee income will be reaching their expiration date and will be dissolving and liquidating their assets.

Thus, two of the largest and most important Partnerships on which GC has been relying for fee income—All Suites and Outlook IV—are at the end of their term and, absent the Rollup, would liquidate themselves. Prospectus at 92. These two Partnerships alone appear to have generated some $2.5 million in management fees for GC in fiscal 1994—some 15% of GC's reported revenues. Supplement at pages 152-158, 202-206. If the Rollup does not go forward, All Suites and Outlook IV will dissolve and these fees will vanish. Indeed, most of the Partnerships are at or near their projected expiration date and will pass out of existence unless the Rollup is approved. Prospectus at 41. As these Partnerships are phased out, GC's revenues, cash flow and net income will be significantly reduced.

Moreover, the General Partners have chosen to employ a far different methodology in computing GC's fiscal 1994 cash flow than they used in computing the cash flow for the Partnerships.[11]Accordingly, the figures for GC's cash flow and for those of the Partnerships are not comparable to each other.

In sum, reliance on the "adjusted" historical cash flow of GC for the aberrational and unrepresentative fiscal year 1994, without considering future earning capacity or actual results from other years, is improper and does not mitigate the fairness of the transaction to the limited partners.

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(11) *See* Prospectus at 102-103

(iv) Failure to Consider Determinants Of Value Other Than Cash Flow

Furthermore, in allocating stock in the REIT between the Allocation Partnerships and themselves, the General Partners relied solely on a cash flow comparison, and paid no attention to any other relevant factors, such as market comparables or asset values. This dereliction is particularly significant because the analysis failed to reflect the fact that the Partnerships owned real estate which had a substantial market value, while GC owned few, if any, significant assets. Had such considerations been taken into account, the percentage of stock accorded to the shareholders of GC would have had to be substantially reduced.

A balance sheet comparison illustrates this point dramatically. The aggregate book value of the Partnerships, as reported in the Prospectus, is $76.6 million.[12] The book value of the GC assets being contributed to the REIT, on the other hand, is a negative $6.1 million. Prospectus at 5. In light of this disparity, it was fundamentally unfair for the General Partners to give the shareholders of GC 29% of the stock they allocated to the limited partners. See Reilly Declaration, ¶13.

2. The Rollup is Also Unfair Because It Deprives the Limited Partners of Valuable Rights and Extends Substantial Benefits To The General Partners At The Limited Partners' Expense

The Rollup is also unfair in that it deprives the limited partners of valuable rights for inadequate consideration and

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(12) *See* the financial statements of the Partnerships, at pages 277, 279, 281, 283, 285, 287, 291 of the Prospectus. Other measurements of the value of the assets owned by the Partnerships yield remarkably similar valuations. For example, the Prospectus represents that the Partnerships have a "Portfolio value" of $70.7 million (*Id.* at 113), and a "net asset value", exclusive of the costs of the Rollup, of $68.7 million. *Id.* at 268. In addition, the Prospectus represents that if the assets of the Partnerships were immediately liquidated, they would fetch $65.5 million in the marketplace. *Id.* at 15, 86.

unfairly provides benefits to the General Partners. The following points are relevant in this connection:

a. The Rollup Entrenches Management And Prevents The Partnerships From Liquidating Or Adopting Other Strategies to Maximize Returns to The Limited Partners

The Rollup entrenches management by incorporating the property management company, GC, in the REIT, and by giving the General Partners and their affiliates substantial up-front stock in the entity. In so doing, it forecloses the possibility that the Partnerships could either (a) continue to operate as they have historically done; (b) replace management and continue to operate; or (c) liquidate and distribute their assets to the limited partners. This loss of options is highly significant.

The performance of rollups generally has been "dismal". The higher liquidity attributable to rollups "comes at an extremely high cost to the limited partners."[13] Indeed, a recent study has revealed that the estimated loss of value stemming from a typical rollup of a real estate limited partnership is 30% of the investors' original investment.[14] Moreover, in this case, there are no significant benefits to the limited partners to counterbalance the many negatives. Indeed, the Prospectus itself acknowledges that the limited partners would do at least as well financially if the Partnerships were entirely liquidated as they would do by participating in the Rollup, even under the most optimistic scenario for the performance of the REIT. Prospectus at 15. Under these circumstances, it is a breach of fiduciary duty for the General Partners to recommend that the limited partners approve and participate in the Rollup Transaction.

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(13) Geschke, "Regulating Rollups: General Partners' Fiduciary Obligations in Light of the Limited Partnership Rollup Reform Act of 1993", 47 Stanford L. Rev. 85, 90 (Nov., 1994).

(14) *Id.*, 47 Stanford L. Rev. at 94.

The General Partners' motives in creating and recommending the Rollup are highly suspect. If the Rollup goes forward, they will receive publicly traded stock worth an estimated $18-$23 million. Prospectus at 47-48. However, if the Partnerships were to liquidate, the General Partners would receive less than $3 million in cash, and would be saddled with continued ownership of GC as its revenues and profits declined. *Id.*

b. Elimination of $63 Million of Accumulated Rights to Preferred Annual Returns

Under the existing partnership agreements, the limited partners are entitled to approximately $63 million in aggregate accumulated preferred annual returns from the Partnerships. This means that the limited partners would be entitled to receive certain minimum returns before subordinated returns flow to the General Partners. Prospectus at 5, 47. The Rollup would extinguish these preferred returns, thereby benefiting the General Partners. The limited partners will receive no consideration for the surrender of these valuable rights.

c. Unfair Imposition of Massive Transaction Costs On The Limited Partners

The transaction costs of the Rollup will aggregate over $4 million—an expense which would not be incurred but for the transaction. Prospectus at In the event that the Rollup is consummated, these enormous and unproductive transactional costs will be paid by the REIT. Prospectus at 6. Thus, the limited partners, as the owners of 78% of the REIT's stock, will end up shouldering the lion's share of this cost—an immediate dilution of over 5% in the value of their investment. *Id.* The imposition of these expenses on the limited partners without any corresponding benefit is unfair and improper.

d. Elimination of Debts, Personal Guarantees And Liability and Other Benefits For The General Partners and Their Affiliates

In addition to giving the General Partners a controlling interest in the REIT and entrenching them in their positions, the Rollup would also extend to the General Partners and their affiliates a cornucopia of ancillary, but extremely valuable benefits at the expense of the limited partners. First, the Rollup would eliminate at least $4.3 million of liability owed by the General Partners as a result of Partnership debts which they personally guaranteed. Prospectus at 17. Second, it would extinguish personal liability of Robert and Andrew Batinovich on $14.3 million of GC's debt for which they have given personal guarantees. *Id.* Third, the transaction has been structured so as to permit the General Partners to obtain tax benefits of approximately $19 million. *Id.* at 17. These benefits will not be shared by the limited partners, many of whom will incur a tax *detriment* as a result of the transaction. Prospectus at 6-7.

Finally, GPA, Ltd., a partnership controlled by the General Partners and their affiliates, has been given a special deal more favorable than that of any of the other Partnerships. Under that arrangement, GPA receives a share of an Operating Partnership controlled by the REIT instead of REIT stock, together with a redemption right, thus enabling GPA to avoid exposure to a potential decline in the REIT's stock after the Rollup. Moreover, that share exceeds the relative value of the assets which GPA will contribute to the REIT. Prospectus at 149-50. This arrangement is unfair to the partners in the other Partnerships.

B. The Prospectus is Materially False and Misleading

Apart from the fact that the Rollup is substantively unfair to the limited partners, the Prospectus is materially false and misleading in numerous respects. And while this would be improper in any commercial setting, it is especially so where—

as here—the Prospectus has been prepared by the limited partners' own *fiduciaries*![15]

The mispresentations and/or omissions of material fact in the Prospectus include, but are not limited to, the following:

(a) The Prospectus contains numerous representations to the effect that the Rollup represents the best opportunity for the limited partners to obtain distributions and maximize investment value. For example, in a section of the Prospectus entitled "SUMMARY," under the heading, "Benefits of, and Background and Reasons for, the Consolidation," the Prospectus represents:

> Given the prevailing market conditions, the General Partners believe the Consolidation is the most attractive alternative for providing Investors with liquidity and the possibility of increased distributions and investment value as compared to a liquidation of the Partnerships' assets. Accordingly, the General Partners believe the Consolidation is the best means of most closely meeting the Partnerships' original investment objectives.

Prospectus at 8. Similarly, in the "SUMMARY" section of the Prospectus, under the heading, "Recommendation of the General Partners," the Prospectus represents:

> The General Partners believe the Consolidation is the most attractive alternative for providing Investors with liquidity and the possibility of increased distributions and investment value as compared to a liquidation of the Partnerships' assets. Accordingly, the General Partners believe the Consolidation is the best means of meeting the Partnerships' original investment objectives.

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(15) It is hornbook law that general partners stand in a fiduciary relationship with their limited partners. *Sherman v. Lloyd*, 181 Cal. App. 693, 698-99 (1986).

Prospectus at 8. These representations are materially false and misleading, in that, inter alia, the Rollup is most likely to *decrease*—not increase—distributions to the limited partners by virtue of, among other things, (i) the fact that the Rollup would eliminate the limited partners' rights to preferred returns (relative to the General Partners), (ii) the limited partners' ownership interests will be substantially diluted by virtue of the excessive and disproportionate allocation of shares to the GC, (iii) the REIT will be saddled with GC's enormous debt load and massive *negative* book value; and (iv) the limited partners will in effect bear some $4 million of transaction costs in connection with the Rollup, which monies which otherwise would be available to fund distributions (as for operating purposes). In addition, the Rollup is most likely to *decrease*—not increase—the value of the limited partners' holdings by virtue of, among other things, (i) the perpetuation of management by the General Partners (under whom only *one* of the Partnerships has returned the amount of the original invested capital—let alone any return thereon), (ii) the dilution of the limited partners' ownership interests by virtue of the excessive and disproportionate allocation of shares of common stock to the General Partners, (iii) the elimination of the limited partners' rights to preferred returns, (iv) the effective elimination of the limited partners' right to obtain a return of capital through liquidation of the Partnerships' assets during the time originally contemplated by the partnership agreements, and (v) the substantial transaction costs of the Rollup.

(b) The Prospectus contains numerous representations to the effect that the General Partners believe the Rollup is fair to the limited partners. For example, in the "SUMMARY" section of the Prospectus, under the heading "Fairness," the Prospectus represents, "The General Partners reasonably believe the terms of the Consolidation are fair as a whole, and to the Investors in each of the

Partnerships, regardless of which combination of Partnerships is included in the Consolidation." Prospectus at 8. Similarly, in a section of the Prospectus entitled, "FAIRNESS," under the heading, "General Partners' Belief as to Fairness," the Prospectus represents, "The General Partners reasonably believe that the terms of the Consolidation are fair when considered as a whole, and to the Investors in each of the Partnerships, regardless of which of the Partnerships are included in the Consolidation, or whether an Investor receives Shares or Notes, assuming the Minimum Participation requirement is met." Prospectus at 74. These representations are materially false and misleading in that, *inter alia*, (i) the Rollup is grossly unfair to the limited partners for the reasons set forth above, (ii) the General Partners have no reasonable basis to believe, and do not in good faith believe, that the Rollup is fair to the limited partners, and (iii) the Rollup benefits the General Partners at the expense of the limited partners.

(c) The Prospectus contains recommendations by the General Partners that the limited partners approve the Rollup. For example, in the "SUMMARY" section of the Prospectus, under the heading, "Recommendation of the General Partners," the Prospectus represents, "The General Partners have approved the Consolidation and believe the Consolidation is fair as to each Partnership, any combination of Partnerships, and as a whole. The General Partners strongly recommend that the Investors in each Partnership vote "YES" in favor of the Consolidation." Prospectus at 8. These representations are materially false and misleading in that, *inter alia*, (i) the Rollup is grossly unfair to the limited partners for the reasons set forth above, (ii) the General Partners have no reasonable basis to believe, and do not in good faith believe, that the Rollup is fair to the limited partners, and (iii) the Rollup benefits the General Partners at the expense of the limited partners.

(d) The Prospectus contains numerous representations to the effect that the General Partners believe that the Rollup is superior to other alternative available to the limited partners, including continued management in present form. For example, in the "SUMMARY' section of the Prospectus, under the heading, "Comparison of Alternative Consideration," the Prospectus represents:

> The General Partners believe that the comparison of the values that might be realized from various alternatives when considered together with the anticipated effect of the Consolidation on distributions and with all the other differences between continued ownership of Units as compared with the receipt of Shares or Notes, supports the General Partners' conclusion that the consolidation is fair to Investors.

Prospectus at 15. Also, in a section of the Prospectus entitled, "THE CONSOLIDATION AND RELATED TRANSACTIONS," under the heading, "Approval and Recommendations of the General Partners," the Prospectus represents, "The General Partners have approved the Consolidation. The General Partners believe that an investment in the Company through ownership of common stock will provide greater overall benefits to Investors than the benefits derived from an investment in an individual Partnership or from any of the alternatives to the Consolidation considered by the General Partners." Prospectus at 55. These representations are materially false and misleading, in that, *inter alia*, (i) the Rollup is more likely to decrease—not increase—distributions to the limited partners, as discussed above, (ii) the Rollup is more likely to decrease—not increase—the value of the limited partners' holding, as discussed above, and (iii) the General Partners have no reasonable basis to believe, and do not in good faith believe, that the Rollup is preferable to other alternatives available to the limited partners.

(e) The Prospectus contains numerous representations to the effect that the General Partners believe that the allocation of shares as between the Limited Partners, on the one hand, and the Management Companies, on the other, is proper. For example in a section of the Prospectus entitled, "ALLOCATION OF SHARES AND NOTES," under the heading, "Level I Allocation—Allocation Between GC and the Allocation Partnerships as a Group," the Prospectus represents:

> The Company and the General Partners believe the public equity markets will value the Company's Shares based primarily on an evaluation of the Company as an ongoing business, with estimated pro forma adjusted funds from operations and resulting cash distributions being the critical factors in this valuation. Therefore, the Company and the General Partners have determined that it is appropriate and fair to allocate shares the Shares of the Company between the Allocation Partnerships and GC based on their relative contributions to the anticipated operating cash flow of the Company.

Prospectus at 10 1. These representations were materially false and misleading in that, *inter alia*, (i) the methodology of allocating shares in this manner as improper and incomplete insofar as it focused on "cash flow" rather than "value," (ii) the manner in which defendants' purported to apply a comparison based on cash flow was improper and biased in favor of the shareholders of GC, and (iii) under proper valuation techniques, the value of GC relative to the Partnerships was substantially less than that reflected in the Level I allocation.

(f) The Prospectus represents that the allocation of shares as between the shareholders of GC and the Partnerships affords the limited partners a substantial discount because, while the "cash flow" of GC purportedly has increased since the original valuation, the allocation of

shares to GC was not being changed. For example, in a section of the Prospectus entitled, "ALLOCATION OF SHARES AND NOTES," under the heading, "Level I Allocation—Between GC and the Allocation Partnerships as a Group," the Prospectus represents:

> **Allocation of Shares.** The General Partners originally made the allocation of Shares as of September 1, 1994. At that time, operating cash flow was determined to be $7,477,756 for the Partnerships as a group, and $1,897,604 for GC, for a total of $9,375,360. GC's cash flow accounted for 20.24% of total cash flow, and the cash flow of the Partnerships as a group accounted for 79.76% of total cash flow. Accordingly, of the Company's total Common Stock, the Partnerships as a group were allocated 79.76% (5,480,800 Shares), and GC was allocated 20.24% (1,390,815 Shares).
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> * * * *
>
> As a result of the Rancon Transaction, GC's cash flow has increased by approximately 55%. However, the General Partners have elected to maintain the previous percentage allocation of Shares in the Level I Allocation. For allocation purposes, this treatment is equivalent to a substantial discount of the cash flow contributed by GC to the Company in connection with the Consolidation.

Prospectus at 105. These representations are materially false and misleading in that, *inter alia*, (i) the value of GC has not materially improved since the original allocation and (ii) to the extent that the value of GC has changed since the original allocation, it has worsened.

(g) The Prospectus contains numerous representations that rollups involving real estate limited partnerships traded at or above their "asset value per share." For example, in a section entitled "FAIRNESS," under the

heading "Valuation of Shares," the Prospectus made representations concerning the trading history of certain "recent" Rollups. Prospectus at 88. These representations are materially false and misleading in that, *inter alia, in many* (if not most) rollup situations, the average value of the investment has declined substantially.

(h) The Prospectus contains numerous representations concerning the purported advantages of the Rollup. For example, in the section of the Prospectus entitled "BENEFITS OF, AND BACKGROUND AND REASONS FOR, THE CONSOLIDATION," under the heading "Benefits of, and Reasons for, the Consolidation," the Prospectus discusses supposed advantages of the Rollup, including, but not limited to, increased distributions, liquidity and diversification of assets. Prospectus at 51-53. However, these representations are materially false and misleading in that, *inter alia*, (i) the Rollup is more likely to decrease—not increase—distributions to the limited partners, as discussed above, (ii) the common stock of the REIT is likely to trade well below the comparative value of the limited partners' current ownership interests such that any "liquidity" will be realized only through a substantial loss in value, and (iii) given that the assets held by the Partnerships are similar, the Rollup will not result in any meaningful diversification of assets.

III. APPLICABLE LEGAL STANDARDS

The basic prerequisite to approval of a class action settlement is a judicial determination that the settlement is "fair, reasonable, and adequate." *See Grunin v. International House of Pancakes*, 513 F.2d 114, 123 (8th Cir.), *cert. denied*, 423 U.S. 864 (1975).[16] In making this determination, the Court "acts as a fiduciary who must serve as a guardian of the rights of absent class members . . .. The Court cannot accept a settlement that the proponents have not shown to be fair, reasonable, and adequate." *Id. See also I.U.E. v. Unisys Corp.*, 858 F.Supp. 1243, 1264 (E.D.N.Y. 1994)

The Court's duty to scrutinize a settlement is heightened where, as here, a determination on class certification was coincident with the negotiation of a settlement. *Mars Steel v. Illinois National Bank & Trust Co. of Chicago*, 834 F.2d 677, 680-681 (7th Cir. 1987); *Weinberger v. Kendric*, 698 F.2d 61, 73 2d Cir. 1982) *cert denied*, 464 U.S. 818 (1983). As stated by the Second Circuit in *Weinberger,*

> Although we thus refuse to adopt a per se rule prohibiting approval when a class action settlement has been reached by means of settlement classes certified after the settlement, with notice simultaneous with that of the settlement, we emphasize that we are permitting, not requiring, use of this procedure, and also underscore that,...district judges who decide to employ such a procedure are bound to scrutinize the fairness of the settlement agreement with even more than the usual care. This is necessary in order to meet the concerns, noted in the *Manual*, regarding the possibilities of collusion or of undue pressure by the defendants on wouldbe class representatives. Accordingly, we will demand a clearer showing of a settlement's fairness, reasonableness and

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(16) California courts often look to Federal Rule of Civil Procedure 23 (and the case law thereunder) in analyzing class certification issues. *E.g., Schneider v. Vennard*, 183 Cal.App.3d 1340, 1347 (1986).

adequacy and the propriety of the negotiations leading to it in such cases than where a class has been certified and class representatives have been recognized at an earlier date. *Id.*

In determining whether a settlement is fair, reasonable, and adequate, several factors are relevant, including (1) the complexity, expense, and likely duration of the litigation, (2) the reaction of the class to the settlement, (3) the stage of the proceedings and the amount of discovery completed, (4) the risks of establishing liability, (5) the risks of establishing damages, (6) the risks of maintaining the class action through the trial, (7) the ability of the defendants to withstand a greater judgment, (8) the range of reasonableness of the settlement fund in light of the best possible recovery, and (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation. *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 462-463 (2d Cir. 1974); *In re Oracle Securities Litigation*, 829 F.Supp. 1176, 1179 (N.D.Cal. 1993).

Of these, "[t]he most important factor is the strength of the case for plaintiffs on the merits, balanced against the amount offered in settlement." *City of Detroit, supra* at 455 (quoting *West Virginia v. Chas. Pfizer & Co.*, 440 F.2d 1079, 1085 (2d Cir.), *cert. denied sub nom. Cotler Drugs, Inc. v. Charles Pfizer & Co.*, 404 U.S. 871, (1971)). *See also In re Traffic Executive Ass'n Eastern Railroads*, 627 F.2d 631, 633 (2d Cir. 1980); *Armstrong v. Board of School Directors of the City of Milwaukee*, 616 F.2d 305, 314 (7th Cir. 1980). Consistent with that principle, the courts have refused to approve settlements where the consideration provided by the settlement was not adequate. *In re Traffic Executive Ass'n—Eastern Railroads*, 627 F.2d at 63 1; *Buchet v. ITT Consumer Financial Corp.*, 845 F.Supp. 684 (D.Minn. 1994); *Reynolds v. King*, 790 F.Supp. 1101 (M.D.Ala. 1990).

Also, the courts have repeatedly expressed the view that class counsel should not sacrifice the interests of the class for personal gain. *Ficalora v. Lockheed California Co.*, 751 F.2d 995, 996-997 (9th Cir. 1985); *Armstrong*, 616 F.2d at 313; *In re*

General Motors Corp. Engine Interchange Litigation, 594 F.2d 1106, 1129-1131 (7th Cir. *cert denied* 444 U.S. 870 (1979)). Thus, the courts have refused to approve settlements in cases where it appeared that class counsel had compromised the rights of the class in order to benefit themselves.

As will be shown, under these standards, the proposed settlement is this action is not "fair, reasonable, and adequate." Therefore, it must not be approved.

VI. THE SETTLEMENT IS NOT FAIR, REASONABLE AND ADEQUATE

A. The Settlement Confers No Meaningful Benefit on the Class

As noted above, the most important factor in assessing the propriety of a proposed settlement is the strength of plaintiffs' claims balanced against the consideration obtained in the settlement. *City of Detroit v. Grinnell Corp.*, 495 F.2d at 455.[17] As the foregoing discussion shows, plaintiffs claims are extremely strong on the merits. Nonetheless, the proposed settlement of those claims—including all claims for money damages which the class members may have against defendants (or any other persons!) under the federal securities laws and the California Corporations Code—confers no *meaningful benefit* on the members of the class. Therefore, it is not fair, reasonable or adequate.

First and foremost, under the terms of the proposed settlement, the class will not receive *one dime* of cash, stock or other economic consideration. The proposed settlement does not create a settlement fund, nor have the basic terms of the Rollup, i.e., the allocation of shares as between the limited

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(17) This consideration essentially embraces several of the constituent factors articulated in *City of Detroit v. Grinnell Corp.*, *i.e.*, the risk of establishing liability (factor (5)), the risk of establishing damages (factor (6)), the range of the reasonableness of the settlement in light of the best possible recovery (factor (8), and the range of the reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation (factor (9)).

partners (on the one hand) and the General Partners (on the other) been changed. Thus, the limited partners are not receiving any more economic consideration—whether in the form of cash, securities or otherwise—than they would absent the settlement. Yet all claims for damages which the some 13,000 class members may have arising out of this $96 million transaction—including claims which the class members may have under (1) Sections 11 and 12(2) of the Securities Act of 1993 (15 U.S.C. §§77k; 771), (2) Section 10(b) of the Securities Exchange Act of 1934 (15 U.S.C. §78j(b)), (3) California Corporations Code sections 25400 *et seq.*, and (4) California common law (including breach of fiduciary duty, fraud, and negligent misrepresentation) will be permanently released, discharged, and barred. *See* Settlement Agreement at ¶¶2.20; 7.7-7.9. Even worse, the scope of the claims released, discharged, and barred runs not only to the named defendants (and their affiliates), but to *any other person* (such as appraisers, auditors, attorneys and others), even though such parties are not before the Court and have not contributed *anything* to this settlement. Given the total absence of any economic consideration to the class—and the permanent, total and absolute bar on the class members' ability to sue *anyone* in connection with this transaction—the settlement must be rejected.

Furthermore, the two types of "benefits" which the settlement does purport to confer on the class, i.e., "curative disclosures" and restrictions on stock sales and options (see Settlement Agreement at 15), are totally meaningless. For example, the "curative disclosures" amount to a handful of sentences in a document that it approximately *five hundred pages* long! See Settlement Agreement at ¶5.1.1. Indeed, of these new sentences, only three of them appear in the first *three hundred* pages of the Prospectus. This alone demonstrates that the "curative disclosures"—buried, as they are, in an document of overwhelming length and complexity—are totally inconsequential.

Moreover, these "disclosures" add nothing of substance to the content of the Prospectus. While they purport to be "risk factors" of one sort or another, they do little more than duplicate—substance and effect—concepts expressed elsewhere in the Prospectus. Thus, their *quality* is as insignificant as their *quantity*.

That these "disclosures" add nothing of real value to the Prospectus is reflected in the fact that defendants were willing to include these matters in the Prospectus even though the settlement has not been finally approved. If these "disclosures" were truly meaningful, i.e., reflected previously undisclosed information truly *useful* to the limited partners and truly *adverse* to the defendants' position on this transaction, one would think that the defendants would have wanted final approval *before* sending the Prospectus to the limited partners. That they did not simply confirms that the disclosures add nothing to the Prospectus.

The other "benefits" conferred by the settlement are equally insignificant. First, the purported "agreement" on the part of defendant Robert Batinovich and related persons not to sell any of their shares for two years after the rollup provides no benefit to the limited partners. Furthermore, even prior to the settlement, defendant Batinovich and others had *already agreed to sell their shares for a period of one year*! *See* Pre-Effective Amendment No. 2 at 264. Thus, any suggestion that plaintiff s counsel themselves created this restriction is false. Finally, this "restriction" is not absolute; rather, the persons subject to this restriction may sell shares if the *REIT consents*. *Id.*; Pre-Effective Amendment No. 4 at 354.[18] Since the REIT will be controlled by none other than Robert Batinovch, the "restriction" on his (and his affiliates') ability to sell shares is, in reality, no restriction at all.

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(18) Neither the prior agreement nor the conditional nature of the restriction is reflected in the Settlement Agreement, the Order Certifying Settlement Class, Approving Notice of Proposed Settlement, and Setting Settlement Hearing, or (most important) the Notice to the Class.

Similarly, the fact that the REIT (1) is restricted from issuing stock options' to employees for ninety (90) days after the roll-up and (2) must use an exercise price of $15.00 for one year is immaterial. Given that Batinovich and his affiliated owners are already receiving over 1.3 million shares of stock (and may be entitled to earn even more through the GPA Redemption Stock), the provision that they cannot earn even more for ninety (90) days is totally insignificant. Also, the restriction on the exercise price is easily avoided since the REIT need wait only one year before granting options. Thus, these "restrictions" confer no real benefit on the class. Plaintiff's counsel may argue that their efforts have conferred a benefit on the class in that defendants have not taken advantage of "improved" cash flow on the part of GC (relative to the Partnerships) to re-allocate shares to the limited partners.[19] This argument has no merit.—

First, defendants' reliance on "cash flow" is improper. As discussed above, a correct allocation of shares would be based on "fair market value," which (at least in the case of GQ defendants totally fail to address. Therefore, while increases or decreases in "cash flow," properly defined, *might* have some bearing on "fair market value," cash flow does not *equal* "fair market value." Accordingly, defendants' reliance on

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(19) As described above, defendants originally allocated shares between the shareholders of GC, on one hand, and the Partnerships, on the other, based on GC's *budgeted* results for the fiscal year ended June 30, 1995: pursuant to this allocation, the Partnerships were to receive some 5,006,000 shares, and Glenborough was to receive some 1,390,815 shares. See Pre-Effective Amendment No. 2 at 93-94. Thus, of the shares allocated to these entities, the Partnerships were to receive some 78%, and the shareholders of GC were to receive some 22%.

In the final Prospectus, the General Partners contend that the "cash flow" of GC (relative to the Partnerships) is actually far better than that reflected in the original allocation. Prospectus at 11; 105. In this regard, defendnants rely on actual results for the fiscal year ended June 3 0, 1994, as adjusted in numerous respects. Defendants then assert that, because they are not ulitizing the "improved" cash flow figures, the limited partners are, in effect, obtaining a substantial discount.

"improved" cash flow—to the exclusion of "fair market value"—is improper.[20]

Furthermore, to the extent the value of GC has changed in recent months, it has declined! For example, GC's reported pre-tax income for fiscal 1995 was only *one-third* of that reported for 1994. Prospectus at 265. Similarly, net income for fiscal 1995 was less than *one-fourth* of that reported for fiscal 1994. *Id.* Indeed, it appears that, but for the inclusion of the income from the Rancon Partnerships transaction, GC's reported pre-tax income and net income would have been even lower. *See* Supplement at 11.

In addition, the book value of GC declined substantially from 1994 to 1995. As of June 1994, GC's net book value was only $31,000 (itself a remarkably low figure for a concern supposedly worth millions of dollars), but as of June 30, 1995, it was even lower—the book value a *negative* $4.5 million. Prospectus at 275.[21] This, too, provides clear indication that, to the extent the fair market value of GC changed between 1994 and 1995, it *worsened*.

Moreover, according to one of the several measures of cash flow utilized by defendants, GC's cash flow in 1995 was substantially lower than 1994. Indeed, according to this "measure" (*i.e.*, earnings before taxes, depreciation, and amortization ("EBTDA")), cash flow for 1995 was only 60% of what it had been in 1994. Prospectus at 265.

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(20) Here, the time frame during which the value of GC is said to have changed so radically is a few months. However, there is no reason to believe that GC's "fair market value" changed radically between during such a brief time frame, and defendants have failed to identify any factor which would have caused such a radical change. To be sure, GC acquired certain assets relating to the Rancon Partnerships in December, 1994. However, those assets presumably were acquired in an arms-length commercial transaction, *i.e.*, that GC had to pay value reasonably equivalent to the value which it received.

(21) The Prospectus states as well that the net book value of the assets of GC which are being contributed to the REIT is even lower—a *negative $6.1 million*! Prospectus at 5.

In addition, the entire approach of defendants is highly suspicious. As noted, at the time the original allocation was made, actual results for fiscal 1994 were available and could have been used: however, defendants elected to utilize budgeted results for 1995. Since the time of that allocation, the actual results for fiscal 1995 have become available, yet defendants *now* choose to go back to 1994. Why?

B. The Settlement was "Negotiated" at an Early Stage of the Litigation

Another relevant factor concerns the stage of the proceedings and the amount of discovery completed. *City of Detroit v. Grinnell Corp.*, 495 F.2d at 463. This factor provides further reason for rejecting the settlement.

First, the settlement was negotiated at an extremely early stage of the litigation. The Complaint was filed on or about February 21, 1995, and the parties reached "substantial agreement" on a settlement by June, 1995—barely *four months* later. *See* Letter from Darryl P. Rains to Clerk, dated June 27, 1995. Moreover, it appears that there was no significant activity in the case (other than the settlement "negotiations"). Indeed, the only pleadings in the Court's file prior to the settlement are (1) the Complaint itself, (2) Case Management Conference Questionnaires and (3) assorted procedural stipulations and correspondence.

Also, despite the fact the Complaint alleges that the Consolidation was unfair to the limited partners of eight partnerships —indeed, "outrageously unfair" in its allocation of common stock to the General Partners (Complaint at 138)—plaintiff did not seek any form of temporary restraining order, preliminary injunction or similar relief. Thus, plaintiff made absolutely no effort to have the merits of the Complaint tested before this Court.

Finally, so far as class members Barnett, et al. are aware, the litigation was settled before any formal discovery by plaintiff. Plaintiff Blumberg apparently did not propound even

one interrogatory, document request, or request for admission, nor did he take any depositions. While he purported to obtain "relevant information" during the course of settlement negotiations, the material which he reviewed (which is not described) was that which defendants were willing to *voluntarily* produce. Thus, one can only presume that the information made available to plaintiff was highly sanitized.

In short, plaintiff Blumberg made no real effort to stop this unfair transaction, nor did he even attempt to obtain evidence which would have helped prove these claims. Rather, he chose to enter into a quick settlement. This weighs *against* approval.

C. The Settlement is "Tainted" by Virtue of the Provisions Concerning the Plaintiff Incentive Bonus and Plaintiff's Attorneys Fees

As set forth above, the courts have refused to approve settlements where there is evidence that class counsel has sacrificed the rights of the class members in favor of their own. *E.g., Ficalora v. Lockheed California Co.*, 751 F.2d at 996-997. Regrettably, that appears to be the case here.

Despite having obtained no meaningful benefit for the class, plaintiff's counsel negotiated the right to request up to $850,000 in attorneys' fees. Settlement Agreement at ¶9. Such a figure is especially remarkable given that counsel for the plaintiff devoted approximately 850 hours to the litigation. At forty (40) hours per week, this translates into approximately twenty-one (2 1) personweeks—little more than five (5) months of work. And since plaintiff's counsel are requesting an award of some $850,000, they are, in effect requesting an average hourly rate of approximately *$1,000*! Thus, plaintiff's counsel—not the class—are the true beneficiaries of this settlement. More important, the attorneys' fees are payable by the REIT. *Id.* The REIT, however, was formed only for purposes of the Rollup and will have no functional existence unless the Rollup is approved. Since the entity to pay counsel's fees will not even

exist (in any real sense) unless and until the Rollup is approved, plaintiff's counsel now have a *direct financial* interest in consummation of the Rollup.

Simply put, plaintiff's counsel are not only no longer *opposed* to the Rollup, they are not even impartial on the matter, *i.e.*, they have no interest in an unbiased and impartial submission of the matter to a vote by the limited partners. Rather, plaintiff's counsel now share with the General Partners the goal of seeing the Rollup approved. Therefore, their interests squarely conflict with those of the class members.

D. The Ability of Defendants to Withstand a Greater Judgment

Another relevant factor is the defendants' ability to withstand a greater judgment. *City of Detroit v. Grinnell Corp.*, 495 F.2d at 463. Here, the primary relief sought is injunctive, *i.e.*, to prevent consummation of the roll-up. Were plaintiff to prevail on this claim, defendants would not even be exposed to a judgment for money damages (except as might be incidental to injunctive relief). Furthermore, there is no basis in the record to conclude that defendants would be unable to respond to a money judgment: indeed, so far as plaintiffs are aware, defendants have not even made that assertion. Therefore, the settlement cannot be justified on the grounds that defendants would be unable to respond to a money judgment.

E. The Reaction of the Class Members

Another factor is the reaction of the class members. *City of Detroit v. Grinnell Corp.*, 495 F.2d at 463. Because class members Barnett, et al. are unaware of the sentiments of the other class members, they are unable to state whether this factor supports the settlement. However, even if one assumes that most class members are silent, that does not support an inference that they favor the settlement. *In re Oracle Securities Litigation*, 829 F.Supp. at 1179.

F. The Complexity, Expense and Likely Duration of the Litigation

A remaining factor is the complexity, expense, and likely duration of the litigation. *City of Detroit v. Grinnell Corp.*, 495 F.2d at 463. This factor provides little, if any, support for the settlement.

First, were plaintiff Blumberg, class members Barnett, et al. or any other class member permitted to attempt to enjoin the Rollup—which, for the reasons set forth above, they should be permitted to do—such injunctive relief would end this litigation in days. Furthermore, regardless of whether injunctive relief is granted, this litigation is not unduly complex—and it need not be unduly expensive. There are few defendants and the issues are clearly identifiable. Accordingly, this factor does not militate in favor of settlement approval.

V. CONCLUSION

For the foregoing reasons, class members Barnett, Gold, Chaney, Mitchell and Buickerood respectfully request that the motion for final approval be denied in all respects.

Dated:
December 15, 1995

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In The

Supreme Court of the United States

October Term, 1997

SHEILA-GOLD, DONALD A. BARNETT, RONDA CHANEY, LON CHANEY, JR., WILLIAM MITCHELL and ROBERT Q. BUICKEROOD,

Petitioners,

vs.

GLENBOROUGH REALTY CORPORATION, GLENBOROUGH CORPORATION, ROBERT BATINOVICH and ANTHONY BLUMBERG,

Respondents.

On Petition For Writ Of Certiorari To The California Court Of Appeal For The First Appellate District

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I. INTRODUCTION

In *Phillips Petroleum Co. v. Shutts,* 472 U.S. 797 (1985), this Court held that, in a class action lawsuit that seeks predominantly money damages, minimum due process requires that absent class members be allowed to exclude themselves from the lawsuit. The petition for a writ of certiorari now before the Court seeks this Court's review of a California state court judgment which (1) certified a mandatory non-opt out class and (2) approved a settlement which extinguished substantial claims for damages held by the members of the plaintiff class. Petitioners assert that the actions of the California courts violated their right to due process under the Fourteenth Amendment by releasing their claims, and the claims of the other absent class members, for money damages without allowing class members to exclude themselves from the plaintiff class.

In the last five years, this Court has *twice* granted certiorari regarding the issue presented in Petitioners' petition. Twice, however, the Court has dismissed those petitions as improvidently granted.[1] The issue is once again presented for the Court's consideration: whether the certification and settlement of a class action, without affording class members the right to opt out of the class or the settlement, violates the constitutional right of due process, where the class members possess substantial claims for monetary relief which are foreclosed by the settlement. For the reasons stated herein, and in Petitioners' petition, this Court should issue a Writ of Certiorari to the California Court of Appeal and undertake a review of the constitutionality of this issue.

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[1] *Ticor Title Ins. Co. v. Brown,* 511 U.S. 117, 114 S.Ct. 1359, 128 L.Ed.2d 33 (1994); *Adams v. Robertson,* 520 U.S. 83, 117 S.Ct. 1028, 137 L.Ed.2d 203 (1997).

II. ARGUMENT

A. This Court Should Resolve A Split Amongst The Federal Circuit Courts and Between the Federal and California Courts Regarding An Important Constitutional Issue

In opposition to Petitioners' petition, Respondents suggest that the California Court of Appeal below applied this Court's decision in *Shutts* in a conventional manner, and that there is no conflict between that court and any other regarding the due process principles applicable to mandatory class certification. The truth, however, is otherwise. Indeed, in a recently issued opinion, the Fifth Circuit effectively requested that this Court provide further guidance regarding the application of *Shutts*. *Allison v. Citgo Petroleum Corp.*, No. 96-30489, 1998 U.S. App. LEXIS 20171 at *18 n.3 (5th Cir. August 18, 1998) (hereinafter "*Allison*").

Contrary to Respondents' contention, ever since this Court handed down its opinion in *Shutts*, the lower courts and the litigants appearing before them have struggled to determine when, in a class action seeking both injunctive relief and money damages, the former or the latter component "predominates." As a consequence, the Fifth and Ninth Circuits and the California state court all apply different standards to determine "predominance." As is discussed in more detail below, the Fifth Circuit has held that damages predominate whenever they are not incidental to the claims for injunctive or declaratory relief asserted, while the Ninth Circuit has held that, where the claims released in a class action settlement are "substantial," class members must be permitted to opt out of a class action settlement.

The California Court of Appeal, however, has adopted its own standard, one which (to Petitioners' knowledge) no federal court has ever followed. That court has held that ***claims for equitable relief need only be "substantial" to predominate***, and that the trial court has virtually unfettered discretion in making that determination.

There also exists a split between the Third Circuit and the Ninth Circuit as to when due process requires that class

members be allowed to opt out of a class action in which claims for money damages predominate. The Ninth Circuit has held that all class members are entitled to these protections, while the Third Circuit has held that only those class members that are beyond the *in personam* jurisdiction of the trial court are so protected.

B. Issues Presented In The Application of *Shutts*

Two distinct but interrelated issues arise in the settlement of these hybrid class action lawsuits. Specifically, the issues are:

A. At what point do claims for damages predominate over claims for equitable relief? and

B. What means should the courts use to measure claims for damages versus equitable relief?

Each court that has undertaken to apply *Shutts* to a class action has had to contend with these issues.

1. The Determination of When Damages Predominate Has Resulted In a Split of Authority

In *Allison*, the Fifth Circuit Court of Appeals affirmed the denial of mandatory class certification of claims for injunctive relief and money damages brought under Title VII of the Civil Rights Act of 1964.[2] After noting that "the predomination requirement serves to protect the rights of class members regarding their monetary interests" (*Allison* at *27), the Fifth Circuit determined that, in class actions seeking both injunctive relief and damages, claims for money damages predominate "unless [they are] incidental to the requested injunctive or declaratory relief. By incidental, we mean damages that flow directly from liability to the class as a whole on the claims forming the basis of the injunctive or declaratory relief." *Id.* at *30. The Fifth Circuit then found that the monetary relief requested in that action, including compensatory and punitive damages and attorney's fees and

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[2] 42 U.S.C §2000(e).

costs, would require "particularly individualized proof of injury" and "were not sufficiently incidental to the injunctive and declaratory relief being sought to permit them in a (b)(2) class action." *Id.* at 36-37.

Thus, the Fifth Circuit has found that, under *Shutts*, claims for money damages predominate in a class action lawsuit whenever such claims are anything other than incidental to the declaratory relief sought. Under this standard, the certification of the settlement class in the action below was clearly improper.

The Ninth Circuit Court of Appeals has taken a middle road. In *Brown v. Ticor Title Ins. Co.*, 982 F.2d 386 (9th Cir. 1992), *cert. dismissed*, 511 U.S. 117 (1994), that court held that minimum due process requires that parties be given a right to opt out of a class action settlement and certification of a mandatory class where that settlement results in the "foreclosure of substantial claims for money damages." *Id.* at 392. The Ninth Circuit recently applied this standard in *Linney v. Cellular Alaska Partnership*, No. 97-16637, 1998 U.S. App. LEXIS 20484 (9th Cir. August 21, 1998). In that action, the appellate court affirmed the approval of the settlement of a class action seeking both equitable relief and money damages. The Court of Appeals found that the equitable relief obtained in settlement was valued at up to $34 million, while the cash settlement was, at best, only $4 million after costs and attorneys' fees. *Id.* at *13. The court therefore held that claims for money damages did not predominate, and therefore due process did not require that class members be given the right to opt out. *Id.*, citing *Brown v. Ticor Title*, 982 F.2d at 392.[3]

The Third Circuit has yet a different response to *Shutts*. That court has held that, in a class action involving claims for equitable relief and money damages, a mandatory no opt out

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[3] *Linney* contains no discussion of the amount of damages, if any, that were foreclosed by the settlement. Because the *Linney* court relied on *Brown* as circuit precedent, it can be inferred that it concluded that any claims for damages that were foreclosed by the settlement were not "substantial." *See, Jeffries v. Wood*, 114 F.3d 1484, 1492 (9th Cir. 1997) ("Only an en banc panel may overturn existing Ninth Circuit precedent").

class may be certified and the claims for money damages, even if they predominate, may be extinguished in a settlement, so long as the trial court has *in personam* jurisdiction over the members of the plaintiff class. *Grimes v. Vitalink Communications Corp.*, 17 F.3d 1553, 1560 and 1560 n.8 (3d Cir.), *cert. denied*, 513 U.S. 985 (1994). The Ninth Circuit, however, has expressly rejected this approach, finding that the Third Circuit "conflates the requirements of *in personam* jurisdiction with the due process safeguards that *Shutts* guarantees to absent class members . . . " *Epstein v. MCA, Inc.*, 126 F.3d 1235, 1242 (9th Cir. 1997).[4]

The California courts have adopted a much more permissive standard than any of the federal courts in response to this Court's ruling in *Shutts*. In *Bell v. American Title Ins. Co.*, 226 Cal.App.3d 1589 (1991), the Court of Appeal found that *Shutts* "does not compel a due process right to opt out" of actions containing "significant" claims for equitable relief. Instead, the California court found that, where an action contains "significant" claims for equitable relief, it is "within the trial court's discretion to find the case [is] not predominately for monetary relief." *Id.* at 1609-10 And, in both *Bell* and in the action below, the California courts held that the trial court's findings regarding may be "implicit." *Id.* at 1606, App. 22.

The scope of this standard is startling, particularly when compared to those applied by the Fifth and Ninth Circuits. Under the California standard, a mandatory class in settlement of a class action lawsuit will be approved as long as the court concludes that the action raises "substantial" claims for declaratory or injunctive relief. No findings of fact or analysis

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[4] Respondents' citation to *Thomas v. Albright*, 139 F.3d 227 (D.C. Cir. 1997) in support of a purported uniform national application of *Shutts* is inapposite. In that action, the Court of Appeals for the District of Columbia held that a trial court, in its discretion, may permit class members to opt out of a class certified under Rule 23(b)(2). *Id.* at 233-34. The due process protections set forth in *Shutts* are never discussed in that opinion.

of the claims need be undertaken to support such a determination. Instead, the finding need only be "implicit" and thereby effectively beyond review.

2. The Manner In Which Damages and Equitable Relief Are Measured Has Resulted In a Split of Authority

The second issue relating to the application of *Shutts*, how courts determine whether claims for injunctive relief or claims for money damages predominate for the purposes of settlement, also sharply differ from court to court. As discussed, the Ninth Circuit has held that, in the case of a settlement which includes a non-opt out class, courts should look at the claims *foreclosed by the settlement* to determine whether due process mandates that class members be permitted to opt out. *Brown*, 982 F.2d at 392. Petitioners submit that this is the appropriate measure, in that the due process rights that are being protected are those which attach to the claims possessed by the absent class members, and it is these claims that the proponents of a mandatory settlement are asking the courts to extinguish.

The California state courts, by contrast, look to the complaint and the relief obtained in the settlement, and give short shrift to the claims released. App. 22. Moreover, under the California standard, the decision is completely within the "considerable" discretion of the trial court, and will not be overturned absent an abuse of that discretion. *Bell*, 226 Cal.App.3d at 1603; see also App. 22 (trial court has "broad discretion" in determining predominance). And, as discussed, the trial court need not articulate any analysis of the constitutional issue. Any findings with respect to the due process rights of absent class members may be "implicit" in the order certifying a no opt out class. App. 22 n.7.

C. There Is A Split Of Circuit Authority Concerning the Scope of Due Process Protection

Respondents next assert that Petitioners had minimum contacts with the forum state by virtue of their ownership of

partnership interests in a California limited partnership. Relying on *Grimes, supra*, Respondents argue that the *in personam* jurisdiction purportedly conferred by that ownership is a sufficient substitute for the due process right to opt out of a class action settlement that released substantial claims for damages.

The Ninth Circuit, however, has explicitly rejected *Grimes*. *Epstein*, 126 F.2d at 1214. That court found that "[t]here is nothing in *Shutts* . . . – or any other case – to suggest that *Shutts* offers protection only to those absentees who are beyond the *in personam* reach of the forum. Because *Grimes* conflates the requirements of *in personam* jurisdiction with the due process safeguards that *Shutts* guarantees to absent class members, we respectfully decline to follow it." *Id*.

Respondent's argument that *in personam* jurisdiction is a substitute for a due process right to opt out of a settlement that extinguishes substantial claims for damages merely reveals yet another conflict between the Circuits, and yet another reason for this Court to grant Petitioner's petition for certiorari. This Court should therefore undertake to resolve this conflict, and provide necessary guidance to the lower courts.[5]

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[5] Respondents further argue that Petitioners do not have standing to challenge the certification of a mandatory class because they have voluntarily submitted to the personal jurisdiction of the forum by appearing in court to object to the settlement on the merits. Glenborough Opp. at 28. However, as discussed above, the due process right to opt out does not depend on the existence or absence of personal jurisdiction over a particular member or members of the class – all absent class members have a right to opt out. *Epstein*, 126 F.3d at 1242. In any event, Respondents' contention that a class member "acquiesces" in a violation of his due process rights and subjects himself to personal jurisdiction merely by appearing to contest the merits of a settlement is not only unfair but impractical. Where, as here, notice of a settlement is given at the same time as notice of class certification, a class member must be permitted to raise whatever objections he or she has on the merits at the same time as any objections to class certification. To do otherwise would put class members

D. A Mandatory Class Cannot Be Certified When Certification Deprives Class Members Of Their Due Process Rights

It seems axiomatic that a plaintiff class may be certified under state or federal rules of procedure but still offend the constitutional rights of the absent class members. Indeed, such was this Court's ruling in *Phillips Petroleum Co. v. Shutts*. Respondents, however, ignore the supremacy of the United States Constitution over state and federal rules of procedure.

Specifically, Respondents assert that the settlement class was properly certified by the trial court using Rule 23(b)(1)(A) because there was a "risk of inconsistent judgments." At the same time, however, the settlement released substantial claims for damages. And, as this Court has held, minimum due process requires that, where such claims "predominate," class members be given the opportunity to opt out. *Shutts* 472 U.S. at 812. Due process, however, requires that absent class members be provided the opportunity to opt out of *any* class which forecloses substantial claims for lawyers.

The means of certification of a class does not take precedence over the constitutional rights of the members of the class. Rather, it is for the courts and litigants to accommodate those rights in the certification of a class. It would seem obvious that the solution would be to permit certification of claims for injunctive and declaratory relief under Rule 23(b)(1)(A), while permitting class members to exclude themselves from the class as to any claims for money damages. Such was the approach of the Ninth Circuit in *Brown*, wherein the court held that, although class members were barred by res judicata from attempting to relitigate the injunctive relief

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in an untenable situation: If they object on the merits, they may be held to have waived an objection to personal jurisdiction; if they do not object on the merits, they may be held to have waived their objections on the merits, both in the trial court and on appeal. Such a rule would make review of an unconstitutional class certification order effectively impossible to obtain.

granted the class, those class members were not barred from pursuing claims for damages. *Brown*, 982 F.2d at 392.

Respondents also assert that the claims brought by plaintiff Blumberg were "predominantly" equitable, and therefore certification pursuant to Rule 23(b)(2) was appropriate. Respondents, like the courts below, fail to consider the value of the claims released by the settlement (estimated at $10-20 million), and instead focus exclusively on the claims asserted in the complaint. As discussed in the Petition, the original claims for injunctive relief were rendered moot by the time the settlement was approved by the trial court. The Roll-Up had already occurred, and the trial court could therefore not be asked to enjoin that transaction. Nor could the class be given rescission, because the new entity was already being traded on the New York Stock Exchange. Thus, at the time the trial court held hearings on the proposed settlement, only two forms of relief were available to the class: (1) the injunctive relief actually obtained in the settlement, which was virtually worthless, and (2) claims for money damages resulting from the unfair allocation of equity in the new entity to the General Partners.[6]

Here, however, as part of a mandatory non-opt out settlement, the plaintiff below released what was, by his own estimate, class damages of between $10 and $20 million, in return for no tangible benefit to the class. Such claims cannot be fairly characterized as "incidental."

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[6] Respondents' citation to *Scott v. Anniston, Alabama*, 682 F.2d 1353 (11th Cir. 1982) and other cases for the proposition that actions taken by a defendant after a lawsuit is filed do not change the nature of the lawsuit are inapposite. First, none of these opinions concern a class action settlement. Second, all of these opinions predate this Court's decision in *Shutts*. Even if these opinions did concern issues pertinent to the subject matter of the petition (and they do not), their viability today would be open to question.

E. Petitioners Have Standing To Seek a Writ of Certiorari

Finaliy, Respondents assert that, because the constitutional issues implicated by the certification of a mandatory class were first raised below by another group of objectors, Petitioners may lack standing to bring this petition. Glenborough Opp. at 28. However, California law clearly provides that an appellant may argue on appeal any issue raised by another party below. *E.g., Ward v. Taggart*, 51 Cal.2d 736, 742 (1959). The trial court heard and decided the issue presented to this Court by the petition. The issue was raised by Petitioners in the California Court of Appeal, which also heard and decided it. App. 18-24. The disability that prevented this Court from deciding the issue presented in *Adams v. Robertson* is therefore absent here.

III. CONCLUSION

For the reasons stated herein, and in the petition on file, this Court should issue a Writ of Certiorari to the California Court of Appeal and review the decision of the courts below that denies Petitioners and all those similarly situated their constitutional right to due process of law.

Respectfully submitted,

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